14728640

RECORD, CASE No. 13,666.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED SEPTEMBER 30, 1889.

RECORD, CASE No. 13,666.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA

INDEX.

	Original	Print.
Transcript from district court	1	1
Summons and return	1	1
Complaint	3	2
Amended complaint	5	3
Answer of Timothy Young	8	4
Patent to West, June 15, 1880	13	7
Receiver's receipt, August 26, 1879	15	8
Register's certificate, August 26, 1879	16	8
Answer of Alfred Brown	17	9
Exhibit A—Patent to West, June 15, 1880	22	12
B—Receiver's receipt, August 26, 1879	24	13
C—Register's certificate, August 26, 1879	25	13
Reply to answer and counter-claim of Young	26	14
Reply to answer and counter-claim of Brown	28	15
Findings of fact asked by defendant Young	30	16
Exceptions of Young to refusal to find	38	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1892.

	Original.	Print.
Findings of fact as to defendant Young	40	22
Conclusions of law	49	29
Exceptions of Young to findings and conclusions	51	30
Findings of fact asked by defendant Brown	54	31
Conclusions of law asked by defendant Brown	59	36
Exceptions of Brown to refusal to find	61	37
Findings of fact as to defendant Brown	62	37
Conclusions of law	70	43
Exceptions of Brown to findings and conclusions	71	43
Affidavit of Robert J. Gamble	74	45
Order extending time to move for new trial, &c.	76	46
Order extending time to move for new trial, &c.	77	46
Order extending time to move for new trial, &c.	78	47
Order extending time to move for new trial, &c.	79	47
Order extending time to move for new trial, &c.	80	48
Order extending time to move for new trial, &c.	81	48
Order extending time to move for new trial, &c.	82	49
Order fixing amount of supersedeas bond	83	49
Affidavit of service of notice of motion for new trial	84	50
Notice of defendant Young's intention to move for new trial	85	50
Affidavit of service of notice of motion for new trial	88	52
Notice of defendant Brown's intention to move for new trial	89	52
Notice of defendant Young's motion for new trial	92	54
Order overruling defendant Young's motion for new trial	96	56
Notice of defendant Brown's motion for new trial	97	57
Order overruling defendant Brown's motion for new trial	101	59
Bill of exceptions	102	59
Exhibit A—Certified record from the Department of the Interior of the homestead application of Thomas K. West of June 8, 1873, &c.	102	60
Final receiver's receipt	102	60
Application and affidavit	103	60
Final affidavit	104	61
Testimony of Thos. K. West	104	61
John C. Redning	106	63
Charles Henry	107	64
Commissioner's certificate	109	66
Objections to Exhibit A	110	66
Patent to Thos. K. West, June 15, 1880	110	67
Exhibit C—Deed, West *et ux.* to Thayer, June 17, 1885	111	68
Exhibit D—Deed, Thayer *et ux.* to Taylor and Bidwell, June 19, 1885	112	69
Objections to offers	114	70
Admission as to possession	114	70
Testimony of Timothy Young	114	70
S. A. Bidwell	114	70
Rodger Brannan	115	70
Timothy Young	115	71
Exhibit E—Deed, West *et ux.* to Young, January 25, 1881	115	71
F—Deed, West *et ux.* to Young, June 15, 1885	117	72
Testimony of Alfred Brown	121	75
Exhibit G—Deed, West to Weston, August 13, 1881	121	76
Deed, Weston to Brown, August 15, 1881	123	77

int.		Original.	Print.
22	Defendant Young's requests to find	127	80
29	Exceptions of defendant Young	135	86
30	Findings of fact by the court as to Young	136	86
31	Conclusions of law by the court as to Young	145	92
36	Exceptions of defendant Young	148	93
37	Defendant Brown's requests to find	152	94
37	Exceptions of defendant Brown	159	99
43	Findings of fact by the court as to Brown	160	100
43	Conclusions of law by the court as to Brown	168	105
45	Exceptions of defendant Brown	171	106
46	Defendant Young's notice of intention to move for new trial	174	107
46	Defendant Brown's notice of intention to move for new trial	177	109
47	Defendant Young's motion for new trial	181	111
47	Order denying Young's motion for new trial	184	112
48	Defendant Brown's motion for new trial	186	113
48	Order denying Brown's motion for new trial	189	115
49	Judge's certificate to bill of exceptions	190	115
49	Judgment	191	116
50	Bond on appeal of Brown	193	117
50	Notice of appeal of Brown	196	119
52	Bond on appeal of Young	198	119
52	Notice of appeal of Young	201	121
54	Clerk's certificate	202	122
56	Assignment of errors by Brown	204	123
57	Assignment of errors by Young	208	125
59	Transcript of exhibits from district court	212	127
59	Exhibit B—Patent to West, June 15, 1880	213	127
	A—Certified record from the Department of the Interior of the homestead application of Thomas K. West,		
60	No. 4788	215	128
60	Final receiver's receipt	216	129
60	Register's certificate	217	129
61	Receiver's receipt	218	130
61	Receiver's receipt	219	130
63	Application	220	130
64	Affidavits	221	131
66	Register's notice	225	133
66	Testimony of Thomas K. West	226	133
67	Charles Henry	229	135
68	John C. Redwing	232	136
	Exhibit C—Deed, West *et ux.* to Thayer, June 17, 1885	235	137
69	D—Deed, Thayer *et ux.* to Bidwell and Taylor, June 19,		
70	1885	237	140
70	E—Deed, West *et ux.* to Young, January 25, 1881	239	140
70	F—Deed, West *et ux.* to Young, June 15, 1885	241	142
70	G—Deed, West to Weston, August 13, 1881	243	144
70	H—Deed, Weston to Brown, August 15, 1881	245	145
71	Clerk's certificate to exhibits	247	145
71	Order for reargument	248	146
72	Judgment	250	147
75	Grounds for reversal	252	147
76	Statement of costs and disbursements	253	148
77	Petition for appeal	255	149

	Original.	Print.
Affidavit of value	256	150
Order allowing appeal	257	150
Order granting leave to file appeal bond	258	151
Bond	259	151
Citation (copy)	262	153
Affidavits of service of citation	263	153
Docket and minute entries	265	154
Opinion of Thomas, J.	270	157
Citation (original)	275	164
Affidavits of service	276	164
Clerk's certificate	279	165

Print.
150
150
151
151
153
153
154
157
164
164
165

a 384.

Filed February 1st, 1888.

J. H. C. YOUNG, *Clerk.*

1 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH.

The Territory of Dakota sends greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint in this action, which is now filed on the — day of ——, A. D. 188–, in the office of the clerk of the district court within and for the county of Moody, Territory of Dakota, at the court-house, in the village of Flandreau, county of Moody, D. T., and to serve a copy of your answer on the subscribers, at their office, on Phillips Av. street, in the city of Sioux Falls, Dakota Territory, within thirty days after the service of this summons, exclusive of the day of service. If you fail to answer the complaint within that time, the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Sioux Falls, D. T., this seventeenth day of July, A. D. 1885.

WINSOR AND SWEEZEY,
Plaintiff's Attorneys, Sioux Falls, D. T.

(Endorsed:) Original. Territory of Dakota. In district court, —— county. Summons for relief. Complaint filed. Original. Rec. July 16th, 1885. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

I hereby certify that the within summons came into my hands on the 16th day of July, A. D. 1885, and was by me personally served on the within-named defendants by delivering to Alfred Brown, in the village of Flandreau, Moody county, D. T., a true and attested copy of the within summons, and on James Smith by delivering to him, in the village of Egan, Moody Co., D. T., a
2 true and attested copy of the within summons; on Timothy Young, by delivering to his wife, a person over the age — 14 years, in the village of Egan, Moody Co., D. T., a true and attested copy of the within summons, & all the above services made by me on this 21st day of July, A. D. 1885; and I further certify that after

due and diligent search and inquiry I am unable to get service on Samuel Darrow, he not being in my county.

Dated at Flandreau, Moody Co., D. T., this 21st day of July, A. D. 1885.

M. E. COLLEY,
Sheriff of Moody County, D. T.

Fees:

Service and return	60
Additional defendants	1 00
Copys	75
Travel	1 20
	$3 55

3 TERRITORY OF DAKOTA, } ss:
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR
ag't
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, & JAMES SMITH.

The plaintiff complains and alleges, 1st, that he is the owner in fee of the south one-half (S. ½) of the southeast quarter (S. E. ¼) of section number twelve (12) and the north one-half (N. ½) of the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory.

2d. That the said defendants and each of them claim some estate or interest in said premises adverse to the said plaintiff.

3d. That the claims of the said defendants and each of them are without any right whatever, and that the said defendants or either of them has not any right, title, or interest whatever in said land or premises or any part thereof.

Wherefore the plaintiff prays—

1st. That the defendants and each of them may be required to set forth the nature of their claims, and that all adverse claims of the defendants may be determined by a decree of this court.

2d. That by said decree it be declared and adjudged that the defendants and each of them have no estate or interest whatever in or to said land and premises, and that the title of plaintiff is good and valid.

4 3d. That the defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and for such other relief as to this honorable court shall seem meet and agreeable to equity and for the costs of this suit.

WINSOR AND SWEEZEY,
Plaintiff's Attorneys, Sioux Falls, D. T.

(Endorsed:) District court, Moody county. S. S. Taylor against Alfred Brown *et al.* Complaint. Winsor & Sweezey, attorneys for plaintiff, Sioux Falls, D. T. Filed Jul- 16, 1885. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

5 TERRITORY OF DAKOTA, } ss:
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

Amended Complaint.

The plaintiffs complain and allege:

I. That on the 15th day of June, 1880, one Thomas K. West became the owner, by patent of the United States dated on that day, of the south one-half of the southeast quarter of section twelve and the north one-half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the county of Moody and Territory of Dakota.

II. That the said Thomas K. West was an Indian, born in the United States, who had arrived at the age of 21 years and who had abandoned his tribal relations and made satisfactory proof of such abandonment under the rules prescribed by the Secretary of the Interior, and that said land above described was a homestead taken under the laws of the United States and duly proved up by the said Thomas K. West.

III. Plaintiffs further allege that by proper deed of conveyance, duly executed on the 17th day of June, 1885, the said Thomas K. West and one Sophia West, his wife, conveyed and transferred said land to one C. E. Thayer, who on the 19th day of June, by due and proper deed of conveyance, conveyed and transferred said above-described land to the said plaintiffs, who are now the owners jointly of said premises.

IV. The plaintiffs further allege that on information and
6 belief *that* on the 15th day of June, 1885, the said defendant, Timothy Young, received from the said Thomas K. West and Sophia West a pretended deed of said premises.

V. Plaintiffs further allege on information and belief that on the 15th day of August, 1881, the defendant Alfred Brown received from one Sophia Weston, who, plaintiffs allege on information and belief, *that* on the 13th day of August, 1881, received a pretended conveyance of said property from the said Thomas K. West, a pretended conveyance of said premises.

VI. And plaintiffs further allege on information and belief that the said Alfred Brown and Mary E. Brown, his wife, made and de-

livered to one Samuel Darrow a pretended mortgage of the north half of the northeast quarter of section thirteen above referred to.

VII. And the plaintiffs further allege that all and each of the above conveyances from the said Thomas K. West, except the conveyance of the said Thomas K. West to the said C. E. Thayer, was null and void, and that the conveyance of the said Sophia Weston to the said Alfred Brown and the mortgage of the said Alfred Brown to the said Samuel Darrow was null and void for the reason that said land was not subject to alienation or incumbrance in any way or manner until after the 15th of June, 1885.

Plaintiffs therefore pray that each and all of said conveyances above referred to, viz., the deed from Thomas K. West and Sophia West to Timothy Young; the deed from Thomas K. West to Sophia Weston; the deed from Sophia Weston to Alfred Brown, and the mortgage from Alfred and Mary E. Brown, his wife, to Samuel Darrow, may be adjudged and declared clouds on the plain-
7 tiffs' title, and by a decree of this court the said conveyances may be decreed null and void and of no effect, and that the plaintiffs may be adjudged and decreed to be the legal owners of said premises, and to such other and further relief as to the court may seem just and equitable, and for the costs of this action.

WINSOR & SWEZEY,
Plaintiffs' Attorneys.

(Endorsed:) Original. District court, Moody county. S. S. Taylor and S. D. Bidwell against Alfred Brown, Timothy Young, Samuel Darrow, and James Smith. Due and personal service of the within by delivery to us at Egan, on this day, of a true, full, and perfect copy thereof, is hereby admitted. Dated at Sioux Falls, D. T., this 1st day of March, A. D. 1886. J. H. Eno, attorney for def't. Winsor & Sweezey, attorneys for pl'ffs. Sioux Falls, D. T. Filed Apr. 21, 1886. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

8 TERRITORY OF DAKOTA, } ss:
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Answer of Young.

The defendant Timothy Young, for separate answer herein—

I.

1. Denies each and every allegation in plaintiffs' complaint except what is hereinafter admitted.

2. And the said defendant, further answering, alleges that the said deed mention- in said complaint, from said Thomas K. West to said

Thayer, was obtained by plaintiffs with intent to cheat and defraud this defendant out of his said lands and his title thereto and with full notice of defendant's rights in the premises, and were so obtained from said West without consideration, and that the deed by said Thayer to plaintiffs was made in furtherance of the same design and with like intent, and was without any consideration therefor.

II.

And for a further and separate defence—

1. The defendant alleges that a patent to all of the real estate mentioned in said complaint and hereinafter described was issued by the United States to the said Thomas K. West, dated June 15, 1880; a true copy of which said patent is hereto annexed, marked Exhibit "A," and made a part hereof.

And this defendant further alleges that the said Thomas K. West, on the 26th of August, 1879, duly entered said land, under the
9 homestead laws of the United States, at the United States land office at Sioux Falls, Dakota, and received on that day the final receiver's receipt thereof; a true copy of which final receipt is hereto annexed, marked "Exhibit B," and made a part hereof.

And that on the same day the register of said land office duly made and issued his final certificate of such homestead entry; a true copy of which certificate is hereto annexed, marked "Exhibit C," and made a part hereof.

And that thereupon the said patent was duly issued to said Thomas K. West, as aforesaid, and he became and was the absolute owner in fee of said premises, which constitutes the title of said West to said land; which said title in fee he duly conveyed to this defendant, as hereinafter stated.

2. The defendant alleges that said plaintiffs claim that they are the owners of the land and premises set out in said complaint and hereinafter described and claim title thereto under pretended deeds of conveyance from Thomas K. West and Sophia West, his wife, dated June 17, 1885, to C. E. Thayer, and from said Thayer to said plaintiffs, dated June 19, 1885; which said pretended deeds are mentioned in paragraph two of said complaint.

3. That said Thomas K. West mentioned in said complaint had prior to the making of said pretended deeds to plaintiff's grantor, C. E. Thayer, to wit, on or about the 15th day of January, 1881, conveyed by sufficient deed to this defendant, Timothy Young, the southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six (106), of range forty-nine (49), situated in Moody county, Dakota, the same being a part of the land mentioned in said complaint and premises hereinafter described; which deed was duly recorded in the office of the register of deeds
10 of Moody county on the 27th day of January, 1881, in vol. 6 of deeds, on page 322; that thereafter, to wit, on the 15th day of June, 1885, the said Thomas K. West and Sophia West, his wife, conveyed by good and sufficient deed to thid defendant, Timothy Young, the real property mention- in said complaint and here-

inafter described, and that after the making and delivery of the said deed the said Thomas K. West never had, nor have the plaintiffs or either of them since had, nor have they either as grantors or otherwise any rights, title, or interest in or to the said land or any part thereof; which said deed was duly recorded in the office of the register of deeds of Moody county on the — day of June, 1885, in vol. 6 of deeds, on page 322.

III.

And for a further and separate answer and defense the defendant alleges that at the time of the delivery of said alleged deed by said Thayer to the plaintiffs and ever since the 25th day of January, 1881, and prior thereto the defendant has been in the actual and peaceable possession of all the real property described in said complaint and hereinafter described and holding and claiming the same adversely to said Thayer and these plaintiffs and adversely to all other persons, and that neither the said plaintiffs nor any other person during said time have been possessed of said land or any portion of the same.

IV.

And for a counter-claim to said complaint the defendant alleges:

1. That said Thomas K. West became and was the owner of said real property mentioned in said complaint and herein described, as set out and alleged in paragraph one of the second
11 defence in this answer contained.

2. That the defendant is now and was at the commencement of this suit and prior thereto has been the owner in fee and entitled to the possession of all those certain pieces or parcels of land situated, lying, and being in the said county of Moody, described as follows, to wit: The south half of the southeast quarter of section twelve (12) and the north half of the northeast quarter of section thirteen (13), in township one hundred and six (106), of range forty-nine (49).

3. That the said plaintiffs have not nor have either of them any right, title, or interest or right of possession in or to the said described premises or any part thereof; that the said plaintiffs claim to have some right, title, interest, or right of possession in or to the said above-described land adverse to this defendant, and claim that they are the owners thereof, and claim title thereto as grantees of said C. E. Thayer, as hereinbefore, to wit, in the second averment of the second defence, set out in this answer.

4. That said Thomas K. West duly conveyed to this defendant in fee all the said land and real property hereinbefore described, as in the third averment of the second defense in this answer set out, and that said defendant has ever since the granting of said land to him by the said Thomas K. West been the owner of said premises; and this defendant alleges that the said claim of the said plaintiffs to said land, whatever it may be, is against the rights of the defendant and without foundation and is a cloud upon defendant's
12 title to said land and premises.

5. And the defendant further alleges that he has in good

faith, under his title as aforesaid and prior to the commencement of this action, made permanent improvements on the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), range forty-nine (49), of the value of $4,000, consisting of his dwelling-house, barn, sheds, granaries, and other buildings, wells, fences, trees, ornamental trees and shrubbery, and cultivated ground on the premises last above described; that the said land last above described, aside from the said improvements, is worth $3,000.

Wherefore defendant prays that the plaintiffs and each of them be adjudged to produce and bring forward any and all claims which they or either of them have or make upon the above-described land or any part thereof, and that the same may by the decree of this court be declared invalid and of no effect, and that the said plaintiffs be perpetually restrained and enjoined from setting up or making any claim to or upon said premises, and that all such claims be quieted, and that this defendant be declared and adjudged to be the owner and entitled to the possession of the said premises and every part thereof against any claim of the said plaintiffs or either of them, and for such other or further order, decree, or judgment as may be just and equitable to defendant.

J. H. ENO & GAMBLE BROTHERS,
Att'ys for Defendant Young.

13 THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of lands subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the rights of the proprie-

tor of a vain or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

14 In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. COOK, *Secretary.*

Recorded vol. 7, page 193.

S. W. CLARK,
Recorder of the General Land Office.

15 Final receiver's receipt No. 2995; application No. 4788.

Homestead.

RECEIVER'S OFFICE,
SIOUX FALLS, D. T., *August 26th*, 1879.

Received of Thomas K. West the sum of four dollars, being the balance of payment required by law for the entry of the S. ½ S. E. ¼, sec. 12, and N. ½ N. E. ¼ of section 13, in township 106, of range 49, containing 160 acres, under section 2291 of the Revised Statutes of the United States.

$4.00.

J. M. WASHBURNE, *Receiver.*

16 Homestead.

Final certificate No. 2995; application No. 4788.

LAND OFFICE AT SIOUX FALLS, D. T.,
August 26th, 1879.

It is hereby certified that, pursuant to the provisions of section No. 2291, Revised Statutes of the United States, Thomas K. West has made payment in full for the south ½ S. E. ¼ sec. 12 and north ½ N. E. ¼ of section No. thirteen (13), in township one hundred and six (106), of range No. forty-nine (49), of the principal meridian, containing — acres.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Thomas K. West shall be entitled to a patent for the tract of land above described.

B. F. CAMPBELL, *Register.*

(Endorsed:) Territory of Dakota. In district court, Moody county. S. S. Taylor *et al. v.* Alfred Brown *et al.* Answer of Timothy

Young. J. H. Eno & Gamble Bros., att'ys for Young. Service of the within answer admitted this — day of June, 1886. C. H. Winsor, plaintiffs' attorney. Filed Jan. 5, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

17 In District Court, Fourth Judicial District.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Answer of Brown.

The defendant Alfred Brown, for separate answer herein:

I.

1. Denies each and every allegation in the plaintiffs' complaint except what is hereinafter admitted.

2. And the said defendant, further answering, alleges that the said deed mentioned in said complaint from said Thomas K. West to said C. E. Thayer was obtained by plaintiffs with intent to cheat and defraud the defendant out of his said land and his title thereto, and with full notice of defendant's rights in the premises, and were so obtained from said West without consideration therefor, and that the deed by said Thayer to plaintiffs was made in furtherance of the same design and with like intent, and was without any consideration therefor.

II.

For a further and separate defense:

1. The defendant alleges that a patent to all of the real estate mentioned in said complaint, including the land owned by this defendant and hereinafter described, was issued by the United States to the said Thomas K. West, dated on the 15th day of June, 1880, a true copy of which said patent is hereto annexed, marked "Exhibit A," and made a part hereof.

And this defendant further alleges that the said Thomas K. West, on the 26th of August, 1879, duly entered said land under the homestead laws of the United States at the United States
18 land office at Sioux Falls, Dakota, and received on that day the final receiver's receipt thereof, a true copy of which final receipt is hereto annexed, marked "Exhibit B," and made a part hereof.

And that on the same day the register of said land office duly made and issued his final certificate of such homestead entry, a true copy of which certificate is hereto annexed, marked "Exhibit C," and made a part hereof.

And that thereupon the said patent was duly issued to said Thomas

K. West as aforesaid, and he became and was the absolute owner of said premises, which constitutes the title of said West to said land, which said title he duly conveyed to this defendant's grantor, as hereinafter stated.

2. That said plaintiffs' claim that they are the owners of the land and premises set out in said complaint and hereinafter described, and claim title thereto under pretended deeds of conveyance from Thomas K. West and Sophia West, his wife, dated June 17, 1885, to C. E. Thayer, and from said Thayer to said plaintiffs, dated June 19, 1885, which said pretended deeds are mentioned in paragraph 2 of said complaint.

3. That said Thomas K. West, mentioned in said complaint, had, prior to the making of said pretended deed to plaintiffs' grantor, C. E. Thayer, to wit, on or about the 15th day of August, 1881, conveyed by good and sufficient deed to this defendant's predecessor or grantor the land and premises hereinafter described, and that after the making and delivery of said deed the said Thomas K. West never had, nor had the plaintiffs or either of them since had, nor have they, either as grantees or otherwise, any right, title, or in-
19 terest in or to the said land or any part thereof, which said deed was duly recorded in the office of the register of deeds of Moody county on the 7th day of October, 1881, in vol. 2 of Deeds, on page 341.

4. That thereafter, to wit, on or about the 15th day of August, 1881, Sophia West, the said grantee of said Thomas K. West, in the name of Sophia Weston, conveyed, by good and sufficient deed in the name of Sophia Weston, to this defendant, Alfred Brown, the said land and premises hereinafter described, and that he has ever since that date been the owner of said real property.

III.

And, for a further and separate answer and defense, the defendant alleges that he has ever since the date of the last-mentioned deed and prior thereto been in the actual and peaceable possession of the said real property hereinafter described and holding and claiming the same adversely to said plaintiffs and adversely to all other persons, and that neither the said plaintiffs nor any other person during said time have been possessed of said land or any portion of the same, and that at the time of the delivery of the said deed alleged in the complaint to these plaintiffs by said Thayer the land therein described and hereinafter set forth was in the actual possession of the defendant, claiming under a title adverse to that of the grantor in said deed.

IV.

And for a counter-claim to said complaint the defendant alleges:

1. That said Thomas K. West became and was the owner of said real property mentioned in said complaint and herein described,

as set out and alleged in paragraph one of the second de-
20 fense set out in this answer.

2. That the defendant is now and was at the commencement of this suit and at the time of the delivery of said deed by C. E. Thayer to these plaintiffs and ever since on or about August 15th, 1881, has been the sole owner and in the quiet and peaceable possession and occupancy of all that certain piece or parcel of land situated, lying, and being in the said county of Moody, described as follows, to wit: The north half of the northeast quarter of section thirteen (13), in township one hundred and six (106), of range forty-nine (49), and holding the said land adversely to said Thayer and all other persons.

3. That the said plaintiffs have not nor have either of them any right, title, or interest or right of possession in or to the said described premises or any part thereof; that the said plaintiffs claim to have some right, title, interest, or right of possession in or to the said above-described land adverse to this defendant and claim that they are the owners thereof and claim title thereto as grantees of said C. E. Thayer, as hereinbefore, to wit, in the second averment of the second defense, set out in the answer herein.

4. That on the 15th day of August, 1881, the said Thomas K. West duly conveyed to the defendant's predecessor or grantor in fee the said land and real property hereinbefore described, as in third averment of the second defence in this answer set out, and that thereafter, on the 15th day of August, 1881, said grantor of said Thomas K. West conveyed, by good and sufficient deed, to this defendant in fee said land and premises, and said defendant has ever since the granting of said land to him, to wit, August 15, 1881, been the owner of said premises; and this defendant alleges that the said
21 claim of the said plaintiffs to said land, whatever it may be, is against the rights of this defendant and is void and without foundation and is a cloud upon defendant's title to said land and premises.

Wherefore defendant prays that the said plaintiffs and each of them be adjudged to produce and bring forward all claims which they or either of them have or make upon the above-described lands or any part thereof, and that the same may, by the decree of this court, be declared invalid and of no effect, and that the said plaintiffs be perpetually restrained and enjoined from setting up or making any claim to or upon the said premises, and that all of such claims be quieted, and that this defendant be adjudged and declared the owner and of right in the possession of the said premises and every part thereof against any claim of the said plaintiffs or either of them, and for such other and further order, decree, or judgment as may be just and equitable to defendant.

J. H. ENO & GAMBLE BROTHERS,
Attorneys for Def't, Alfred Brown.

22 "EXHIBIT A."

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application No. 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress, approved 20th May, 1862, to secure homesteads to actual settlers on the public domain and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consum-ated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of lands subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and his heirs and assigns forever, subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs,
23 laws, and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. COOK, *Secretary.*

Recorded vol. 7, page 193.

S. W. CLARK,
Recorder of the General Land Office.

24 "EXHIBIT B."

Final receiver's receipt, No. 2995; application No. 4788.

Homestead.

RECEIVER'S OFFICE,
SIOUX FALLS, D. T., *August 26th*, 1879.

Received of Thomas K. West the sum of four dollars, being the balance of payment required by law for the entry of the S. ½ S. E. ¼, sec. 12, and N. ½ N. E. ¼ of section 13, in township 106, of range 49, containing 160 acres, under section 2291 of the Revised Statutes of the United States.

$4.00. J. M. WASHBURN, *Receiver.*

25 "EXHIBIT C."

Homestead.

LAND OFFICE AT SIOUX FALLS, D. T., *Aug. 26th*, 1879.

Final certificate No. 2995; application No. 4788.

It is hereby certified that pursuant to the provisions of section No. 2291, Revised Statutes of the United States, Thomas K. West has made payment in full for the south ½ S. E. ¼, sec. 12, and north ½ N. E. ¼ of section No. thirteen (13), in township No. one hundred and six (106), of range No. forty-nine (49), of the principal meridian, containing — acres.

Now, therefore, be is known that on presentation of this certificate to the Commissioner of the General Land Office the said Thomas K. West shall be entitled to a patent for the tract of land above described.

B. F. CAMPBELL, *Register.*

(Endorsed:) Territory of Dakota. In district court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Answer of Alfred Brown. Eno & Gamble Bros., att'ys for Brown. Service of the within answer admitted this — day of June, 1886. C. H. Winsor, pl'ffs' att'ys. Filed Jan. 5, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

26 TERRITORY OF DAKOTA, } ss:
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

The plaintiffs reply to the counter-claim of the defendant Timothy Young and admit—

I. That the said Thomas K. West became and was the owner of the real property described in plaintiffs' complaint and as set out and alleged in paragraph (1) of the second defense set out in the answer of Timothy Young.

II. Plaintiffs deny each and every allegation set out in defendant Timothy Young's counter-claim, except as above admitted and except that they have claimed to be the owners of said land and claim title thereto as grantees of one C. E. Thayer and the said Thayer's wife, as more specifically set out in the complaint in this action.

III. The plaintiffs, further replying, allege that the said Thomas K. West referred to in the former pleadings in this action was an Indian, born in the United States, who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of said abandonment under the rules prescribed by the Secretary of the Interior of the United States, and that said land above described was a part of the homestead
27 taken under the laws of the United States provided for such persons as he was, and was duly proved up by the said Thomas K. West.

IV. That on the 15th day of June, 1880, the said Thomas K. West received a patent of the United States dated on that day, including the land described in defendant Timothy Young's counter-claim, with other lands.

V. Plaintiffs further allege that on the 17th day of June, 1885, the said Thomas K. West and Sophia West, his wife, conveyed and transferred to one C. E. Thayer, who on the 19th day of June, by due and proper deed of conveyance, conveyed and transfer-ed said land to the said plaintiffs, who are now the owners jointly to said premises.

VI. Plaintiffs further allege that the conveyances to the said Timothy Young were each and all of them made prior to the 16th day of June, 1885, and within five years from the date of patent from the United States to the said Thomas K. West, and were therefore each and all of them null and void and conveyed no interest, title, or color of title in any way, shape, or manner to the said Timothy Young or his predecessor or grantor.

Plaintiffs therefore pray that the deeds and conveyances to the said Timothy Young and his predecessor or grantor may be de-

clared null and void and of no effect, and that the plaintiffs be adjudged and decreed to be the legal owners of said premises, and for such other and further relief as to the court may seem just and equitable.

C. H. WINSOR,
Pl'ffs' Attorney.

(Endorsed:) (Copy.) District court, Moody county. S. S. Taylor and S. A. Bidwell against Alfred Brown, Timothy Young, Samuel Darrow, and James Smith. Timothy Young's answer to counter-claim. Served Aug. 9, '86. C. H. Winsor, attorney for pl'ffs, Sioux Falls, D. T. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

28 TERRITORY OF DAKOTA, } *ss:*
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants,

The plaintiffs reply to the counter-claim of the defendant Alfred Brown and admit:

I. That the said Thomas K. West became and was the owner of the real property described in plaintiffs' complaint and as set out and alleged in paragraph (1) of the second defence set out in the answer of Alfred Brown.

II. Plaintiffs deny each and every allegation set out in defendant Alfred Brown's counter-claim except as above admitted and except that they have claimed to be the owners of said land and claim title thereto as grantees of one C. F. Thayer and the said Thayer's wife, as more specifically set out in the complaint in this action.

III. The plaintiffs, further replying, allege that the said Thomas K. West referred to in the former pleadings in this action was an Indian born in the United States, who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of said abandonment under the rules prescribed by the Secretary of the Interior of the United States, and that said land above described was a part of the homestead taken under the laws of the United States provided for such per-
29 sons as he was and was duly proved up by the said Thomas K. West.

IV. That on the 15th day of June, 1880, the said Thomas K. West received a patent of the United States, dated on that day, including the land described in defendant Alfred Brown's counter-claim, with other lands.

V. Plaintiffs further allege that on the 17th day of June, 1885, the said Thomas K. West and Sophia West, his wife, conveyed and

transferred said land to one C. E. Thayer, who on the 19th day of June, by due and proper deed of conveyance, conveyed and transferred said land to the said plaintiffs, who are now the owners jointly to said premises.

VI. Plaintiffs further allege that the conveyances to the said Alfred Brown were each and all of them made prior to the 16th day of June, 1885, and within five years from the date of said patent from the United States to the said Thomas K. West, and were therefore each and all of them null and void and conveyed no interest, title, or color of title in any way, shape, or manner to the said Alfred Brown or his predecessor or grantor.

Plaintiffs therefore pray that the deeds and conveyances to the said Alfred Brown and his predecessor or grantor may be declared null and void and of no effect, and that the plaintiffs be adjudged and decreed to be the legal owners of said premises, and for such other and further relief as to the court may seem just and equitable.

C. H. WINSOR,
Pl'ffs' Attorney.

(Endorsed:) (Copy.) District court, Moody county. S. S. Taylor and S. A. Bidwell against Alfred Brown, Timothy Young, Samuel Darrow, and James Smith. Alfred Brown's answer to counter-claim. Served Aug. 9, '86. C. H. Winsor, attorney for pl'ffs, Sioux Falls, D. T. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

30 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.
} Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs, and Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Timothy Young:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

Homestead certificate No. 2995; application 4788.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure
31 homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated, in conformity to law, for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

[L. S.]

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of Deeds, on page 193.

II.

That on the 25th day of January, A. D. 1881, said Thomas K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Ter-
32 ritory, for the consideration of two hundred and seventy-five ($275.00) dollars, the same being a part of the land mentioned and described in the said patent to said Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota, on the 27th day of January, A. D. 1881, at 10 o'clock a. m., in vol. 2 of Deeds, on page 225, of which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, his heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above-bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the first — will warrant and defend; and said Sophia West hereby relinquishes her right of dower in and to the above-described premises.

In witness whereof that said parties of the first part have here-

unto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN.
GEO. C. WESTMAN.

TERRITORY OF DAKOTA, }
County ——. }

On this 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared
33 Thomas K. West and Sophia West, his wife, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

And the said Sophia West, wife of the said Thomas K. West, on a private examination apart from her husband, acknowledged to me the contents and meaning of the foregoing deed, being fully made known to her; that she signed the same freely and understandingly, without fear or compulsion of her said husband or any other person.

Witness my signature and official seal hereto affixed the day and date last above written.

ALFRED BROWN,
[SEAL.] *Notary Public.*

III.

That the defendant Timothy Young entered into actual possession of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), on or about the 25th day of January, A. D. 1881, claiming it in his own right and title thereto in good faith under said deed mentioned in finding No. 2 aforesaid, and the said defendant has ever since the date last aforesaid occupies, used, and cultivated said land, having and keeping the same by substantial enclosure, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs, and has erected and made permanent improvements thereon, and that the value of the said improvements, aside from the value of said land, is two thousand five hundred ($2,500.00) dollars.

IV.

The the value of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), aside from the value of the improvements thereon, is two thousand ($2,000.00) dollars.

V.

That on the 15th day of June, A. D. 1885, the said Thomas
34 K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the said south half of the southeast quarter of section twelve (12), the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of nine hundred dollars, and on said last-mentioned date the said defendant entered into the actual possession of all of the said premises, claiming it in his own right and titles thereto; and the said defendant has ever since the date last aforesaid occupied and used the said land, and has been and remained in actual possession of the whole of said premises, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs, which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 15th day of June, A. D. 1885, at 8 o'clock a. m., in Book 6 of Deeds, pages 322 and 323, of which said deed the following is a copy, to wit:

This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young, of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land situated in the county of Moody and Territory of Dakota and known and described as follows, to wit:

The south half of the southeast quarter of section No. twelve (12) and the north half of the northeast quarter of section No. thirteen (13), all in township No. one hundred and six (106) north, of range No. forty-nine (49) west, of 5th principal meridian:

35 To have and to hold the above quitclaimed premises, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN EASTMAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to me that they executed the same.

ALFRED BROWN,
Justice of the Peace, Moody Co., D. T.

VI.

That the said Thomas K. West and Sophia West, from the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer, mentioned in the amended complaint herein, *was was* not in the actual possession or otherwise of the said real property mentioned and described in the 5th finding of fact herein or any part thereof.

VII.

That the said C. E. Thayer *or* Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, *was* not, on the 19th day of June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said plaintiffs, mentioned *mentioned* in the amended complaint herein, in the actual possession of the real property mentioned and described in the 5th finding of fact or any part thereof.

36 VIII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 5th finding of fact herein since and long prior to the 15th day of June, A. D. 1885, and that the defendant first entered upon said premises justly and lawfully and not as a trespasser as against the rights of any or either of said plaintiffs or of those under or through whom they claim.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

I.

That the defendant Timothy Young is the owner in fee simple and entitled to the possession of all the tracts and parcels of land mentioned and described in the amended complaint herein, to wit:

The south half of the southeast quarter of section twelve (12) and the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), Moody county, D. T., as against the plaintiffs all and severally and

all persons claiming or to claim the same or any part of said land under them, the said plaintiffs, or either of them, and that neither one of said plaintiffs has any right, title, or interest in or to said land or any part thereof.

II.

That the defendant Timothy Young is entitled to a decree, as prayed for in his answer, to declare invalid and of no effect
37 the said deed to the said plaintiffs and the deed to grantor or predecessor of the said plaintiffs, and to quiet his title to said land against said plaintiffs and each of them and all persons claiming or to claim the same or any part thereof under or through the said plaintiffs or either of them.

III.

That the defendant Timothy Young is entitled to a judgment for c/sts, to be taxed herein.

And judgment is hereby ordered to be entered accordingly.

(Endorsed:) District court, Moody county. S. S. Taylor *et al. v.* Alfred Brown *et al.* Findings presented to the court by Timothy Young. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Eno & Gamble Bros., att'ys for def't. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

38 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court of Moody County.

S. S. TAYLOR and S. A. BIDWELL }
vs.
ALFRED BROWN and TIMOTHY YOUNG *et al.* }

And now comes the defendant Timothy Young within the proper time and makes and enters the following exceptions to the refusal of the court to find as requested by said defendant:

The said defendant Young excepts to the refusal of the court:

1. To make and find the third finding of fact as proposed by said defendant Young.

2. To the refusal of the court to make and find the fifth finding of fact as proposed by said defendant Young.

3. To the refusal of the court to make and find the seventh finding of fact as proposed by said defendant.

4. The said defendant Young excepts to the refusal of the court to make and find the eighth finding of fact as proposed by said defendant.

5. The said defendant Young excepts to the refusal of the court to make and find the first conclusion of law requested by said defendant.

6. The said defendant Young excepts to the refusal of the court

to make and find the second conclusion of law requested by said defendant.

39 7. The said defendant Young excepts to the refusal of the court to make and find the third conclusion of law requested by said defendant.

Dated February 16th, 1887.

J. H. ENO & GAMBLE BROTHERS,
Att'ys for said Defendant Young.

(Endorsed:) District court, Moody county. S. S. Bidwell *et al. v.* Alfred Brown *et al.* Exceptions of defendant Young to refusals to find as requested. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

40 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.
} Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs, and J. H. Eno & Gamble Brothers appeared as attorneys for the said defendants Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Timothy Young:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 2788.

41 To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land

office at Sioux Falls, Dakota Territory, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is, therefore, granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

42 In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,

[L. S.] By WM. H. CROOK, *Secretary.*

S. W. CLARK,

Recorder of the General Land Office.

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of deeds, on page 193.

II.

That on the 25th day of January, A. D. 1881, said Thomas K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory,

for the consideration, as expressed in the deed, of two hundred and seventy-five ($275.00) dollars, the same being a part of the land mentioned and described in the said patent to the said Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota, on the 27th day
43 of January, A. D. 1881, at 10 o'clock a. m., in vol. 2 of deeds, on page 225, of which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, his heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances; and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the
44 first — will warrant and defend; and said Sophia West hereby relinquishes her right of dower in and to the above-described premises.

In testimony whereof the said parties of the first part have hereunto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN.
GEO. C. WESTMAN.

TERRITORY OF DAKOTA, }
—— *County.* }

On this 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, his wife, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

And the said Sophia West, wife of the said Thomas K. West, on a private examination apart from her said husband, acknowledged to me, the contents and meaning of the foregoing deed being full-made known to her, that she signed the same freely and understandingly, without fear or compelsion of her said husband or any other person.

Witness my hand and official seal, hereto affixed, the day and date last above written.

[SEAL.] ALFRED BROWN,
Notary Public.

45 III.

That the defendant Timothy Young entered into actual possession of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), on or about the 25th day of January, A. D. 1881, claiming it in his own right and title thereto under said deed mentioned in finding No. 3 aforesaid, and the said defendant has, ever since the date last aforesaid, occupied, used, and cultivated said land (having and keeping the same by substantial enclosures), using and claiming the same in his own right from said date to the present time, adversely to all the world and especially as against the said plaintiffs, and has erected and made permanent improvements thereon, and that the value of the said improvements, aside from the value of said land, is two thousand ($2,000.00) dollars.

IV.

That the value of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), aside from the value of the improvements thereon, is two thousand ($2,000.00) dollars.

V.

That on the 15th day of June, A. D. 1885, the said Thomas K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the said south half of the southeast quarter of section twelve (12), the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Terri-
46 tory, for the consideration as expressed in the deed of nine hundred dollars, and on said last-mentioned date the said defendant entered into the actual possession of all of the said prem-

ises, claiming it in his own right and title thereto; and the said defendant has, ever since the date last aforesaid, occupied and used the said land and has been and remained in actual possession of the whole of said premises, using and claiming the same in his own right from said date to the present time, adversely to all the world and especially as against the said plaintiffs; which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 15th day of June, A. D. 1885, at 8 o'clock a. m., in Book 6 of Deeds, pages 322 and 323, of which said deed the following is a copy, to wit:

This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young, of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land situated in the county of Moody and Territory of Dakota and known and described as follows, to wit:

47 The south half of the southeast quarter of section No. twelve (12) and the north half of the northeast quarter of section No. thirteen (13), all in township one hundred and six (106) north, of range No. forty-nine (49) west, of the 5th principal meridian; to have and to hold the above quitclaimed premises, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN EASTMAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and

within instrument, and acknowledged to me that they executed the same.

ALFRED BROWN.
Justice of the Peace, Moody Co., D. T.

VI.

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit,
48 on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer, mentioned in the amended complaint herein, was not in the actual possession or otherwise of the said real property mentioned and described in the 3rd finding of fact herein or any part thereof.

VII.

That the said C. E. Thayer or Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, was not on the 19th day of June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said plaintiffs mentioned in the amended complaint herein in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

VIII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 5th finding of fact herein since and long prior to the 15th day of June, A. D. 1885.

IX.

That Thomas K. West was a Sioux Indian who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of such abandonment by taking an oath of allegiance to the United States Government and who was entitled under sections 15 and 16 of chapter 131 of the Laws of the United States, passed March 3rd, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30th, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States and
49 had entered said land under said laws and duly proved up on the same and received the patent referred to in finding I of said land.

X.

That Sophia Weston's real name was Sophia West, and she was the wife of Thomas K. West, the patentee in the patent before referred to.

XI.

That on the 19th day of June, 1885, C. E. Thayer and his wife made, executed, and delivered to the plaintiffs in this action a deed for the premises described in said patent.

XII.

That all of the deeds to Alfred Brown, Sophia West, and Timothy Young were made within 5 years from the date of the patent to Thomas K. West by the United States.

XIII.

That the adverse possession of Alfred Brown and Timothy Young is entirely founded on conveyances that are absolutely null and void.

XIV.

That the possession of Alfred Brown and Timothy Young of said premises and the improvements made thereon by them were made with full notice that Thomas K. West was an Indian, as described in finding IX.

And the court makes the following conclusions of law:

I. That the land described in said patent was absolutely inalienable prior to the 16th day of June, 1885; that the deeds from Thomas K. West to Timothy Young of January 15th, 1881, June 15th, 1885, and from Thomas K. West to Sophia West of August 15th, 1881, and from Sophia West to Alfred Brown of August 15th, 1881, are null and void.

50 II. That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell are good and valid conveyances and conveyed the title of said premises to the said plaintiffs.

III. That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises. Let judgment be entered accordingly.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al.* against Alfred Brown *et al.* Findings of fact and conclusions of law. C. H. Winsor, attorney for pl'ff-, Sioux Falls, D. T. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

51 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

And now comes the defendant Timothy Young at the proper time and for himself, and severally excepts to each of the findings of fact found by the court herein and to each and every part of said findings; and the said defendant Timothy Young further specifically excepts thereto as follows:

I. To the ninth finding of fact and to each and every part thereof, for the reason that the said U. S. patent is absolute on its face and conveys the fee-simple title to the said Thomas K. West, the patentee therein named, without any conditions or restrictions whatever, and the fact as to whether said West was an Indian or had abandoned his tribal relations or had made declaration and proof as in said finding stated could not be introduced in evidence or found by the court to affect the title of the grantee of the said West, to wit, the said defendant Young in this action.

II. To the eleventh finding of fact and to each and every part thereof, for the reason that said West, prior to the execution of said alleged deed to Thayer, had parted with the whole of his title to said land and did not own or possess the same or any part thereof, and that all of said property described in said deed to Thayer and in said patent was then held adversely to the said Thayer and to the plaintiffs in this action by the said defendant Young.

III. To the twelfth finding of fact and to each and every
52 part thereof, for the reason that said deed dated June 15, 1885, made by said West to the said defendant Young was not within five years from the date of said patent and was not within any limitation of the said statute of the United States.

IV. To the thirteenth finding of fact and each and every part thereof, for the reason that said finding is a conclusion of law and is contrary to law and the evidence in the case, and that said deeds to the said defendant Young were legal and valid.

V. To the fourteenth finding of fact and to each and every part thereof, for the reason that said deeds to said Young were legal and valid, and that if notice that said West was an Indian is material such fact was not alleged in plaintiffs' amended complaint.

VI. And the said defendant Young severally excepts to each of said conclusions of law and to each and every part of said conclusions.

VII. And the said defendant Young further specifically excepts to the first conclusion of law for the reason that said land was alienable prior to June 16, 1885, and that said deeds to this defendant, Young, were legal and valid.

VIII. To the second conclusion of law and to each and every part thereof, for the reason that said deed of West to Thayer and from Thayer and wife to the plaintiffs were invalid and illegal, because said West had theretofore parted with the whole of his title to said land, and that said deeds were void because said land was held adversely by this defendant against said Thayer and the said plaintiffs.

IX. To the third conclusion of law and to each and every part thereof, for the same reasons stated in the exceptions to the
53 second conclusion of law, and for the reason that said conclusion is not sustained by the evidence or by the said findings of fact of the judge, because the evidence shows from said patent and from said deeds of West and wife to the defendant Young that said Young is the sole owner of said premises described in said patent, and that said West had no title thereto at the time he made the said deed to Thayer, and that said property was held adversely by this defendant, as stated in the objection to the said second conclusion of law.

J. H. ENO & GAMBLE BROTHERS,
Attorneys for Defendant Young.

(Endorsed:) District court, Moody county. S. S. Taylor and S. A. Bidwell *v.* Alfred Brown, Timothy Young, *et al.* Exceptions of Timothy Young to findings of fact & conclusions of law of court. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

54 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendant-. } Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs and J. H. Eno and Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Alfred Brown:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office
55 at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is, therefore, granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of Deeds, on page 193.

II.

That on the 13th day of August, A. D. 1881, the said Thomas K. West, mentioned in said patent, granted to Sophia West, in the name of Sophia Weston, the north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine, in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, the same being a part
56 of the land mentioned and described in said patent to Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, in volume 2 of Deeds, on page 341, of which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, the following described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty-nine:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal this 13th day of August, A. D. 1881.

THOMAS K. WEST. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. ENO,
J. H. PETTIT,
Witnesses.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

J. H. ENO,
Notary Public.

57 III.

That on the 15th day of August, A. D. 1881, the said Sophia West, in the name of Sophia Weston, granted to the defendant Alfred Brown the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range (49), in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 17th day of August, A. D. 1881, in volume 2 of Deeds, page 315, of which said deed the following is a copy, to wit:

Know all men by these presents that Sophia Weston, of Moody county and Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen, town. one hundred and six, 106, range forty-nine, 49:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Sophia Weston, party of the first part, for her heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
Witnesses:
J. H. ENO.
JOSEPH GARSON.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

58 Be it remembered that on this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Sophia Weston, to me personally known to be the identical person who is described in the foregoing deed as grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereto affixed the day and date last above written.

J. H. ENO,
[SEAL.] *Notary Public.*

IV.

That the defendant Alfred Brown entered into actual possession of the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), on or about the 15th day of August, A. D. 1881, claiming it in his own right and title thereto in good faith under said deed mentioned in finding No. 3 aforesaid; occupied, used, and cultivated said land, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs.

V.

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of said deed to the said Thayer, mentioned in the amended complaint herein, was not in the actual possession or otherwise of the said real property mentioned in the 4th finding of fact herein or any part thereof.

VI.

That the said C. E. Thayer *or* Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, *was* not on the 19th day of June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said
59 plaintiffs mentioned in the amended complaint herein in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

VII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 3rd finding of fact herein, and that the defendant first entered upon said premises justly and lawfully and not as a trespasser as against the rights of any or either of said plaintiffs or of those under or through whom they claim.

As conclusion of law from the foregoing facts the court now hereby finds and decides:

I.

That the defendant Alfred Brown is the owner in fee simple and entitled to the possession of the tract and parcel of land mentioned and described in the amended complaint herein, to wit:

The north half of the northeast quarter of section thirteen (13), in township one hundred and six (106), of range forty-nine (4-), Moody county, D. T., as against the plaintiffs all and severally and all persons claiming or to claim the same or any part of said land under them, the said plaintiffs, or either of them, and that neither one of said plaintiffs has any right, title, or interest in or to said land or any part thereof.

II.

That the defendant Alfred Brown is entitled to a decree, as prayed for in his answer, to declare invalid and of no effect the said
60 deed to the said plaintiffs and the deed to grantor or predecessor of the said plaintiffs, and to quiet his title to said land against said plaintiffs and each of them and all persons claiming or to claim the same or any part thereof under or through the said plaintiffs or either of them.

III.

That the defendant Alfred Brown is entitled to a judgment for costs, to be taxed herein.

And judgment is hereby ordered to be entered accordingly.

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Findings presented to the court for Alfred Brown. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Eno & Gamble Bros., att'ys for def'ts. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

61 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court of Moody County.

S. S. TAYLOR and S. A. BIDWELL }
vs.
ALFRED BROWN and TIMOTHY YOUNG *et al.* }

And now comes the defendant Alfred Brown and makes and enters the following exceptions to the refusal of the court to find as requested by said defendant:

The defendant Brown excepts to the refusal of the court—

1. To make and find the fourth finding of fact as proposed by said defendant Brown.

2. To the refusal of the court to make and find the seventh finding of fact as proposed by said defendant Brown.

3. The said defendant excepts to the refusal of the court to make and find the first conclusion of law requested by said defendant Brown.

4. The said defendant excepts to the refusal of the court to make and find the second conclusion of law as requested by said defendant Brown.

5. The said defendant excepts to the refusal of the court to make and find the third conclusion of law requested by said defendant Brown.

Dated Feb. 16th, 1887.

J. H. ENO & GAMBLE BROTHERS,
Atty's for Def't Brown.

(Endorsed:) District court, Moody county. S. S. Taylor and S. A. Bidwell *v.* Alfred Brown *et al.* Exceptions to refusal of court to find as requested by Brown. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

62 TERRITORY OF DAKOTA, }
Fourth Judicial District, } *ss:*

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs, }
vs. } Findings by the Court.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. }

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs and J. H. Eno & Gamble Brothers appeared as attorneys for the said defendants Alfred Brown and Timothy Young, the other parties not having been served or appeared

herein; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Alfred Brown:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

63 THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water right for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of the courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the
64 same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 15th day of June, in the year of our Lord one thousand eight hundred and

eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
[L. S.] *Recorder of the General Land Office.*

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in vol. 7 of Deeds, on page 193.

II.

That on the 13th day of August, A. D. 1881, the said Thomas K. West, mentioned in said patent, granted to Sophia West, in the name of Sophia Weston, the north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, the same being a part of the land mentioned and described in said patent to Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, in volume 2 of Deeds, on page 341, of which said deed the following is a copy, to wit:

65 Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty-nine:

To have and to hold the same, together with all the hereditaments and appurtenaces thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances; and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim — part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal this 13th day of August, A. D. 1881.

THOMAS K. WEST. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. ENO,
J. H. PETTIT,
Witnesses.

66 TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D., 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

J. H. ENO,
Notary Public.

III.

That on the 15th day of August, A. D. 1881, the said Sophia West, in the name of Sophia Weston, granted to the defendant Alfred Brown the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars; which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 17th day of August, A. D. 1881, in volume 2 of Deeds, page 315, of which said deed the following is a copy, to wit:

Know all men by these presents that Sophia Weston, of Moody county and Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being
67 in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen, town. one hundred and six, 106, range forty-nine, 49:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Sophia Weston, party of the first part, for her heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid and has good right to sell and

convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
J. H. ENO,
JOSEPH GARSON,
Witnesses.

TERRITORY OF DAKOTA, } *ss:*
County of Moody, }

Be it remembered that on this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Sophia Weston, to me personally known to be the identical person who is described in the foregoing deed as
68 grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereto affixed the day and date last above written.

[SEAL.]

J. H. ENO,
Notary Public.

IV.

That the defendant Alfred Brown entered into actual possession of the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), on or about the 15th day of August, A. D. 1881, claiming it in his own right and title thereto under said deed mentioned in finding No. 3 aforesaid; occupied, used, and cultivated said land, using and claiming the same in his own right from said date to the present time adversely to all the world and especially as against the said plaintiffs.

V.

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer mentioned in the amended complaint herein, was not in the actual possession or otherwise of the said real property mentioned in the 3rd finding of fact herein or any part thereof.

VI.

That the said C. E. Thayer or Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, was not, on the 19th day of

June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said plain-
69 tiffs mentioned in the amended complaint herein, in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

VII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 3rd finding of fact herein.

IX.

That Thomas K. West was a Sioux Indian who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of such abandonment by taking an oath of allegiance to the United States Government, and who was entitled, under sections 15 and 16 of chapter 131 of the Laws of the United States, passed March 3rd, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30th, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States, and had entered said land under said laws and duly proved up on the same and received the patent referred to in finding I of said land.

X.

That Sophia Weston's real name was Sophia West, and she was the wife of Thomas K. West, the patentee in the patent before referred to.

XI.

That on the 19th day of June, 1885, C. E. Thayer and his wife made, executed, and delivered to the plaintiffs in this action a deed for the premises described in said patent.

70 XII.

That all of the deeds to Alfred Brown, Sophia West, and Timothy Young were made within 5 years from the date of the patent to Thomas K. West by the United States.

XIII.

That the adverse possession of Alfred Brown and Timothy Young is entirely founded on conveyances that are absolutely null and void.

XIV.

That the possession of Alfred Brown and Timothy Young of said premises and the improvements made thereon by them were made

with full notice that Thomas K. West was an Indian, as described in finding IX.

And the court makes the following conclusions of law:

I. That the land described in said patent was absolutely inalienable prior to the 16th day of June, 1885; that the deeds from Thomas K. West to Timothy Young, of January 15th, 1881, June 15th, 1885, and from Thomas K. West to Sophia West, of August 15th, 1881, and from Sophia West to Alfred Brown, of August 15th, 1881, are null and void.

II. That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell are good and valid conveyances and conveyed the title of said premises to the said plaintiffs.

III. That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises. Let judgment be entered accordingly.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al.* against Alfred Brown *et al.* Findings of fact & conclusions of law. C. H. Winsor, attorney for pl'ffs, Sioux Falls, D. T. Filed Jan. 7, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

71 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

And now comes the defendant Alfred Brown at the proper *prime* for himself and severally excepts to each of the findings of fact by the court herein, and to each and every part of the same, and the said defendant, Alfred Brown, specifically excepts thereto as follows:

I. To the ninth finding of fact and to each and every part thereof, for the reason that the said U. S. patent is absolute on its face and conveys the fee-simple title to the said Thomas K. West, the patentee therein named, without any conditions or restrictions whatever, and the fact as to whether said West was an Indian or had abandoned his tribal relations or had made declaration and proof as in said finding stated could not be introduced in evidence or found by the court to affect the title of the grantee of the said West, to wit, the said defendant Brown in this action.

II. To the eleventh finding of fact and to each and every part

thereof, for the reason that said West, prior to the execution of said alleged deed to Thayer, had parted with the whole of his title to said land and did not own or possess the same or any part thereof, and that all of said property described in said deed to Thayer and in said patent which is claimed by said Brown in his answer was then held adversely to the said Thayer and to the plaintiffs in this action by the said defendant Brown.

III. To the twelfth finding of fact and to each and every
72 part thereof, for the reason that said deed, dated June 15, 1885, made by the said West to the said defendant Brown was not within five years from the date of said patent and was not within any limitation of the said statute of the United States, and for the reason said patent is absolute and said Brown became the sole owner of said land claimed by him and the said deed to him without any limitation of five years or otherwise.

IV. To the thirteenth finding of fact and each and every part thereof, for the reason that said finding is a conclusion of law and is contrary to law and the evidence in the case, and that said deeds to the said defendant Brown were legal and valid.

V. To the fourteenth finding of fact and to each and every part thereof, for the reason that said deeds to said Brown were legal and valid, and that if notice that said West was an Indian is material such fact was not alleged in plaintiffs' amended complaint.

VI. And the said defendant Brown severally excepts to each of said conclusions of law and to each and every part of said conclusions.

VII. And the said defendant Brown further specifically excepts to the first conclusion of law, for the reason that said land was alienable prior to June 10, 1885, and that said deeds to this defendant Brown were legal and valid.

VIII. To the second conclusion of law and to each and every part thereof, for the reason that said deed of West and wife to Thayer and from Thayer and wife to the plaintiffs were invalid and illegal because said West had theretofore parted with the whole of his title to said land, and that said deeds were void because said land was held adversely by this defendant against said Thayer and the said plaintiffs.

73 IX. To the third conclusion of law and to each and every part thereof, for the same reasons stated in the exception to the second conclusion of law and for the reason that said conclusion is not sustained by the evidence or by the said findings of fact, because the evidence shows from said patent and from said deeds of West and wife to the defendant Brown that said Brown is the sole owner of said premises described in said patent, and that said West had no title thereto at the time he made the said deed to Thayer, and that said property claimed by this defendant was held adversely by this defendant, as stated in the objection to the said second conclusion of law.

GAMBLE BROTHERS,
Attorneys for Defendant Brown.

(Endorsed:) District court, Moody county. S. S. Taylor & S. A. Bidwell *v.* Alfred Brown, Timothy Young, *et al.* Exceptions of Alfred Brown to findings of fact & conclusions of law of the court. Filed Aug. 31, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

74 TERRITORY OF DAKOTA, } *ss:*
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

COUNTY OF YANKTON, *ss:*

Robert J. Gamble, being duly sworn, deposes and says that he is one of the attorneys for the said defendants, Brown and Young; that the said cause was tried before the court without a jury, at the January, A. D. 1887, term of said court, and consideration thereof was taken under advisement by the said court.

Deponent further says that he is advised that the said court has rendered a decision and made and returned his findings of fact and conclusions of law in favor of the said plaintiffs and against the said defendants, Brown and Young; that deponent is at present busily engaged in the business of the said firm of Gamble Brothers and will be for some time to come, and that the senior member of said firm is absent from the Territory, and he desires an extension of time and a stay of proceedings therein upon the matters and things set out in the annexed order.

Deponent further says that he saw the presiding judge of the said district, the Hon. C. S. Palmer, in the city of Yankton, on the 21st day of January, A. D. 1887, and was informed by the said Palmer at that time that he intended to be absent from the Territory and would leave it on January 24th, 1887, and would be in the
75 city of St. Paul for a few days and from there intended going to Bismarck, in said Territory, and that to the best of deponent's knowledge the judge is absent from the Territory.

He therefore asks the extension prayed for in the within order by the judge of the second judicial district court.

ROBERT J. GAMBLE.

Subscribed and sworn to before me this 25th day of January, A. D. 1887.

EDWARD A. MAGLONE,
[NOTARIAL SEAL.] *Notary Public.*

76 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On application of Alfred Brown and Timothy Young, the defendants, by their attorneys, Gamble Brothers (on the affidavit of Robert J. Gamble), and sufficient cause appearing therefor—

Ordered that the time be, and the same is hereby, extended thirty days from this date to said defendants for preparing and serving a notice of intention to move for a new trial and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein by the court and serving and hearing a motion for a new trial herein and for preparing and settling the bill of exceptions herein, and in the meantime all proceedings herein are stayed.

Done at Yankton, Dakota, this 25th day of January, A. D. 1887.

By the court:

BARTLETT TRIPP, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Affidavit and order extending time.

77 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On application of Alfred Brown and Timothy Young, the defendants, by their attorneys, Gamble Brothers, and sufficient cause appearing therefor—

Ordered that the time be, and the time is hereby, extended sixty days from this date to said defendants for preparing and service a notice of intention to move for a new trial and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein by the court and to the refusals to find as asked for by the defendants and serving a motion for a new trial herein and for preparing and settling the bill of exceptions herein, and in the meantime all proceedings herein are stayed.

Done at Sioux Falls this 23 day of February, A. D. 1887.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Order extending time.

78 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On application of the defendants Alfred Brown and Timothy Young within the proper time and sufficient cause existing therefor—

Ordered that the time for preparing and settling the bill of exceptions herein and for preparing and service of notice of intention to move for a new trial and for making such motion and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein by the court and to the refusals to find as asked for by the said defendants and for serving a motion for a new trial herein be, and the same is hereby, extended to the first day of June, 1887, and that in the meantime all proceedings are stayed.

Done at Sioux Falls, D. T., in said district, this 19th day of April, 1887.

By the court:

C. S. PALMER, *Judge.*

79 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On application of the defendants Alfred Brown and Timothy Young within the proper time and sufficient cause existing therefor—

Ordered that the time for preparing and sett-ing the bill of exceptions therein and for preparing and service of notice of intention to move for a new trial and for making such motion and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein by the court and to the refusals to find as asked for by the said defendants and for serving a motion for a new trial herein be, and the same is hereby, extended to the 20th day of July, 1887, and that in the meantime all proceedings are stayed.

Done this 23rd day of May, 1887.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. Taylor *et al. vs.* Brown *et al.* Order extending time for settlement of bill of exceptions.

80 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On the application of the defendants Alfred Brown and Timothy Young and within the proper time and good and sufficient cause existing therefor, it is—

Ordered that the time for preparing and settling the bill of exceptions herein and for preparing and serving a notice of intention to move for a new trial and for making such motion and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein and to the refusals to find as asked for by said defendants and for serving a motion for a new trial herein be, and the same is hereby, extended to the 13 day of August, 1887, and that in the meantime all proceedings are hereby staid.

Done at Sioux Falls, in said district, this 8 day of July, 1887.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown. Order extending time for settling bill of exceptions, &c. Gamble Bros., def'ts' att'ys, Yankton, Dak.

81 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On the application of the defendants Alfred Brown and Timothy Young and within the proper time and good and sufficient cause existing therefor, it is—

Ordered that the time for preparing and settling the bill of exceptions herein and for preparing and serving a notice of intention to move for a new trial and for making such motion and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein and to the refusals to find as asked for by said defendants and for serving a motion for a new trial herein be, and the same is hereby, extended to the 15 day of September, 1887, and that in the meantime all proceedings are hereby stayed.

Done at Sioux Falls, in said district, this 8 day of August, 1887.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. J. Taylor *et al. vs.* Alfred Brown *et al.* Order extending time, &c.

82 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

On the application of the defendants Alfred Brown and Timothy Young and within the proper time and good and sufficient cause existing therefor, it is—

Ordered that the time for preparing and settling the bill of exceptions herein and for preparing and serving a notice of intention to move for a new trial and for making such motion and for making and filing exceptions and objections to the findings of fact and conclusions of law made herein and to the refusals to find as asked for by said defendants and for serving a motion for a new trial herein be, and the same is hereby, extended to the first day of October, 1887, and that in the meantime all proceedings are hereby stayed.

Done at Elk Point, in said district, this 9th day of September, 1887.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Order extending time for settling bill of ex's, &c. District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Orders extending time. Filed Sep. 23, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

83 TERRITORY OF DAKOTA, } ss:
4th Judicial District, }

In District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Order.

And now, this 22nd day of September, 1887, the defendants Brown and Young having duly moved the court to fix the amount of supersedeas bonds herein, and due notice having been given to the plaintiffs' counsel for that purpose, and said plaintiffs appearing by C. H. Winsor, their attorney, and Gamble Bros. appearing for said defendants Young and Brown, and the plaintiffs consenting thereto,

it is ordered that such supersedeas bonds for a stay of all proceedings in this action be, and are hereby, fixed at the sum of one thousand dollars.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al.* against Alfred Brown *et al.* Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

84 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

T. B. McMartin, being duly sworn, deposes and says that he is over the age of 21 years, and at the request of Gamble Brothers he served the within and annexed notice of intention to move for a new trial on C. H. Winsor, the plaintiffs' attorney, by delivering to and leaving with him personally at his office in the city of Sioux Falls, in said county and Territory, on the seventh day of September, A. D. 1887, a true copy thereof. Deponent further says that he knows the person so served to be the C. H. Winsor mentioned in said notice as plaintiffs' attorney herein.

T. B. McMARTIN.

Subscribed and sworn to before me this 7th day of September, 1887.

E. W. HARVEY,
[SEAL.] *Notary Public, Dakota.*

85 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, attorney for plaintiffs:

Take notice that the defendant Timothy Young intends to move the court to vacate and set aside the findings and decision of the court rendered in the above cause, and to grant a new trial in said cause upon the following grounds:

I. For insufficiency of evidence to justify the findings of the court in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitations or restrictions of the power of alienation or otherwise; that said West, previous to his having made the said deed to Thayer, had conveyed all his title to said property described in the patent to the defendant Young, first, to the forty acres described in Exhibit E, and, second, to the whole land described in said patent as shown in

Exhibit F, and said West had no title in said land to convey to Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs and these plaintiffs took no title by or from Thayer, because five years had expired from the date of said patent when said deed, dated June 15, 1885, by said West and wife, was made and delivered to this defendant Young.

Because the findings in favor of said plaintiffs and against this defendant are contrary to the evidence for the reasons above
86 stated, and because said 40 acres of land described in Exhibit E was at the time of the delivery of said deed by West and wife to Thayer and by Thayer and wife to these plaintiffs in the actual possession of this defendant, claiming under his said title adverse to each and all of said parties, and because the whole of said land described in the patent was so in the actual possession of said Young, claiming under his said title adverse to all of said parties.

II. Because said findings and decision and each of them are against law, because said conclusions of law are each of them contrary to law and the facts as found by said judge.

III. Errors at law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against said defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from West and wife to said Thayer, marked "Exhibit C," against this defendant's objection; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting in evidence the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting in evidence that said West was an Indian and as to his nationality against the defendant's objection; to which ruling the defendant duly excepted.

The court erred in refusing to find the third, fifth, seventh,
87 and eighth findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making and finding the first, second, third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 3, 5, 7, 8, 9, 11, 12, 13, and 14 finding- of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first, second, and third conclusion- of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact and conclusions of law requested by this defendant;

on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

GAMBLE BROTHERS & J. H. ENO,
Atty's for Def't Young.

(Endorsed:) Territory of Dakota, fourth judicial district. In district court of Moody county. S. S. Taylor and S. A. Bidwell *v.* Alfred Brown and Timothy Young *et al.* Notice of intention to move for a new trial. (Case of Young.) District court, Moody county. S. S. Taylor and S. A. Bidwell *vs.* Alfred Brown, Timothy Young, *et al.* Notice of intention to move for new trial. Gamble Bros., attorneys for def't Young, Yankton, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

88 TERRITORY OF DAKOTA, } 88:
County of Minnehaha, }

T. B. McMartin, being duly sworn, deposes and says that he is over the age of 21 years, and, at the request of Gamble Brothers, he served the within and annexed notice of intention to move for a new trial on C. H. Winsor, the plaintiffs' attorney, by delivering to and leaving with him personally at his office, in the city of Sioux Falls, in said county and Territory, on the 7th day of September, A. D. 1887, a true copy thereof. Deponent further says that he knows the person so served to be the C. H. Winsor mentioned in said notice as plaintiffs' attorney therein.

T. B. McMARTIN.

Subscribed and sworn to before me this 7th day of September, 1887.

[SEAL.] E. W. HARVEY,
Notary Public, Dakota.

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

89 TERRITORY OF DAKOTA, } 88:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, Esq., attorney for plaintiffs:

Take notice that the defendant Alfred Brown intends to move the court to vacate and set aside the findings of fact and decision of

the court rendered in the above cause and to grant a new trial in said cause upon the following grounds:

I. For insufficiency of the evidence to justify the findings of the court, in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him, without any limitations or restrictions of the power of alienation or otherwise.

That said West and his wife, Sophia West, previous to their having made the said deed to the said Thayer, had conveyed all the title to a part of the property described in the said patent to this defendant, Alfred Brown, described as follows, to wit: The north half of the northeast quarter of section 13, in township 106, of range 49, in said Moody county, Dakota Territory, by prior deeds duly executed by the said Thomas K. West to his wife, Sophia West, and by the said Sophia West to this defendant, as shown by Exhibits G and H, and the said Thomas K. West or Sophia West had no title in said land to convey to the said Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and the
90 said plaintiffs took no title by or from said Thayer.

Because the findings in favor of said plaintiffs and against said defendant are contrary to the evidence for the reasons above stated, and because the said 80 acres of land above described and shown in Exhibit- G and H, at the time of the delivery of said deed by West and wife to said Thayer and by Thayer and wife to these plaintiffs, was in the actual possession of this defendant, claiming under his said title by the said deed from the said Sophia West of date August 15, A. D. 1881, adverse to each and all of said plaintiffs.

II. Because said findings and decision and each of them are against law, because said conclusions of law are and each of them contrary to the law and the facts found by said judge.

III. Errors of law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against this defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from the said Thomas K. West and his wife to the said Thayer, marked "Exhibit C," against this defendant's objections; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting in evidence that said West was an Indian and as to his nationality against this defendant's
91 objection; to which ruling th- defendant duly excepted.

The court erred in refusing to find the fourth and seventh findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making the first, second, and third conclu-

sions of law requested by this defendant; to each of which refusals this defendant at the proper — duly excepted.

The court erred in making the 4th, 7th, 9th, 10th, 11th, 12th, 13th, and 14th findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first second, and third conclusions of law; to each of which decisions and conclusion- the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court and the findings of fact and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c.,

J. H. ENO & GAMBLE BROTHERS,
Atty's for Defendant Brown.

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Notice of intention to move for new trial by Brown. Gamble Bros., att'ys for def't Brown. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk. District court, Moody county, S. S. Taylor and S. A. Bidwell *vs.* Alfred Brown, Timothy Young, *et al.* Gamble Bros., attorneys for Brown, Yankton, Dakota.

92 TERRITORY OF DAKOTA, } *ss:*
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, attorney for plaintiff:

Please take notice that the defendant Timothy Young will move the court on the 16th day of September, 1887, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, before the Honorable C. S. Palmer, presiding judge, at the court-house, at the city of Elk Point, in the county of Union, in said district and Territory, to set aside the findings and decision of the court rendered in the above-entitled cause and to grant a new trial in said cause upon the following grounds, to wit:

I. For insufficiency of evidence to justify the findings of the court, in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him, without any lim-

itations or restriction of the power of alienation or otherwise; that said West, previous to his having made the said deed to Thayer, had conveyed all his title to said property described in the patent to the defendant Young, first, to the 40 acres described in "Exhibit E," and, second, to the whole land described in said patent, as shown in "Exhibit F;" and said West had no title in said land to convey to Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and these plaintiffs took no title by or from Thayer, because five years had expired from the date of said
93 patent when said deed dated June 15, 1885, by said West and wife was made and delivered to this defendant Young.

Because the findings in favor of said plaintiffs and against this defendant are contrary to the evidence for the reasons above stated, and because said 40 acres of land described in "Exhibit E" was, at the time of the delivery of said deed by West and wife to Thayer and by Thayer and wife to these plaintiffs in the actual possession of this defendant, claiming under his said title adverse to each and all of said parties, and because the whole of said land described in the patent was in the actual possession of said Young, claiming under his said title adverse to all of said parties.

II. Because said findings and decisions and each of them are contrary to law, because said conclusions of law are, each of them, contrary to law and the facts as found by said judge.

III. Errors at law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against said defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from West and wife to said Thayer, marked "Exhibit C," against this defendant's objection; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting in evidence that said West was an Indian and as to his nationality against defendant's objection; to which ruling the defendant duly excepted.

The court erred in admitting in evidence the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against
94 this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in refusing to find the third, fifth, seventh, and eighth findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making and finding the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 3, 5, 7, 8, 9, 11, 12, 13, and 14 finding- of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first,

second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper — duly excepted.

Said motion will be made upon the minutes of the court — the findings of fact and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c.,

GAMBLE BROTHERS & J. H. ENO,
Att'ys for Defendant Young.

(Endorsed:) Territory of Dakota, fourth judicial district. In district court of Moody county. S. S. Taylor and S. A. Bidwell *v.* Alfred Brown, Timothy Young, *et al.* Motion for new trial. J. H. Eno & Gamble Bros., att'ys for Young & Brown, Yankton, D. T. District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown & Timothy Young. Motion for new trial. (Young.) Due personal service of the within motion for new trial is hereby admitted this 7th of September, A. D. 1887, at Sioux Falls, Dakota. C. H. Winsor, attorney for plaintiff; Gamble Bros., attorneys for Brown
95 & Young, Yankton, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

96 TERRITORY OF DAKOTA, } *ss:*
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

And now, this 16th day of September, A. D. 1887, at the time and place mentioned in said motion, the said motion for a new trial coming on to be heard and having heard Gamble Brothers for the same and C. H. Winsor, attorney for the plaintiffs, *contra*—

It is ordered that said motion for a new trial be, and the same is hereby, overruled and denied.

By the court:

C. S. PALMER, *Judge.*

And thereupon said defendant, Timothy Young, then and there duly excepted.

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Order overruling motion for new trial. Young. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

97 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Motion for New Trial.

To C. H. Winsor, attorney for plaintiffs:

Please take notice that the defendant Alfred Brown will move the court on the 16th day of September, 1887, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, before the Honorable C. S. Palmer, presiding judge, at the court-house, at the city of Elk Point, in the county of Union, in said district and Territory, to vacate and set aside the above-entitled cause, and for a new trial, upon the following grounds, to wit:

I. For the insufficiency of the evidence to justify the findings of the court in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitation or restrictions of the power of alienation or otherwise.

That said West and his wife, Sophia West, previous to their having made the said deed to the said Thayer had conveyed all the title to a part of the property described in the said patent to this defendant, Alfred Brown, described as follows, to wit, the north half of the northeast quarter of section 13, in township 106, of range 49, in said Moody county, Dakota Territory, by prior deeds, duly executed, by the said Thomas K. West to his wife, Sophia West, and by
98 the said Sophia West to this defendant, as shown by Exhibits G and H, and the said Thomas K. West or Sophia West had no title in said land to convey to the said Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and the said plaintiffs took no title by or from said Thayer.

Because the findings in favor of said plaintiffs and against said defendant are contrary to the evidence for the reasons above stated, and because the said 80 acres of land above described and shown in Exhibits G and H at the time of the delivery of said deed by West and wife to these plaintiffs was in the actual possession of this defendant, claiming under his said title by the said deed from the said Sophia West, of date August 15, A. D. 1881, adverse to each and all of said plaintiffs.

II. Because said findings and decision and each of them are against law, because said conclusions of law are and each of them contrary to the law and the facts so found by said judge.

III. Errors of law occurring at the trial and duly excepted to by this defendant:

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against this defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from the said Thomas K.

West and his wife to the said Thayer, marked "Exhibit C," against this defendant's objections; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

99 The court erred in admitting in evidence that West was an Indian, and as to his nationality, against this defendant's objection; to which ruling this defendant duly excepted.

The court erred in refusing to find the fourth and seventh findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 4th, 7th, 9th, 10th, 11th, 12th, 13th, and 14- findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto, on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c.,

GAMBLE BROTHERS & J. H. ENO,
Att'ys for Defendant Brown.

(Endorsed:) District court, Moody county. S. S. Taylor
100 *et al. vs.* Alfred Brown *et al.* Motion for new trial by def't Brown. Gamble Bros, att'ys for def't Brown. District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown, Timothy Young. Motion for new trial (Brown). Due personal service of the within motion for new trial is hereby admitted this 7th of September, A. D. 1887, at Sioux Falls, Dakota. C. H. Winsor, attorney for plaintiffs. Gamble Bros., attorneys for Brown & Young, Yankton, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

101 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

And now, this 17th day of September, A. D. 1887, at the time and place mentioned in said motion, the said motion for new trial coming on to be heard, and having heard Gamble Brothers for the same, and C. H. Winsor, attorney for the plaintiff, *contra*—

It is ordered that said motion for a new trial be, and the same is hereby, overruled and denied.

By the court:

C. S. PALMER, *Judge.*

And thereupon said defendant, Alfred Brown, then and there duly excepted.

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Order overruling motion for new trial. Brown. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

102 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

Bill of Exceptions.

Be it remembered that this cause having been duly called on for trial before the Honorable C. S. Palmer, presiding judge of this court, at a regular term of said court held at the city of Flandreau, in the county of Moody, in said district and Territory, on the 5th day of January, 1887, the following proceedings were had, to wit:

The plaintiffs, to maintain the issues on their part, offered in evidence the following certified record from the Department of the Interior of the homestead application of Thomas K. West, dated June 8, 1873, for the land described in the pleadings herein and affidavits in connection with said application; also final receiver's receipt, dated August 26, 1879, under section # 2291 of the Revised Statutes of the United States; the affidavit of said West as claimant, together with the testimony of his witnesses on such final proof, including the certificate of the Commissioner of the General Land Office thereto annexed, in words and figures following, to wit:

(EXHIBIT A.)

Final receiver's receipt No. 2995; application No. 4788.

Homestead.

RECEIVER'S OFFICE AT SIOUX FALLS, D. T., *August* 26, 1879.

Received from Thomas K. West the sum of four dollars,
103 being in full for the balance of payment required by law for the entry of the S. ½ S. E. ¼ sec. 12 and N. ½ N. E. ¼ of section 13, in township 106, of range 49, containing 106 acres, under section 2291 of the Revised Statutes of the United States.

J. M. WASHBURN, *Receiver.*

Homestead.

Indian. Application No. 4788.

LAND OFFICE AT SIOUX FALLS, D. T., *June* 18*th*, 1873.

I, Thomas K. West, of Moody county, D. T., do hereby apply to enter, under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," the S. ½ S. E. ¼ sec. 12 and N. ½ N. E. ¼ of section thirteen, in township 106, of range 49, containing 160 acres.

THOMAS K. WEST.

LAND OFFICE AT SIOUX FALLS, D. T., *June* 18, 1873.

I, B. F. Campbell, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and that there is no prior, valid, adverse right to the same.

B. F. CAMPBELL, *Register.*

Homestead.

Indian. (*Affidavit.*)

LAND OFFICE AT SIOUX FALLS, D. T., *June* 18*th*, 1873.

I, Thomas K. West, of Moody county, D. T., having filed my application, No. 4788, for an entry under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear that I am the head of a family, consisting of a wife and children, and a citizen of the United States; that said application No. 4788 is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit and not, directly or indirectly, for the benefit or use of any other person or persons whomsoever; neither have I heretofore perfected or abandoned an entry made under this act.

THOMAS K. WEST.

Sworn to and subscribed this 18th day of June, A. D. 1873, before—

B. F. CAMPBELL,
Reg. of the Land Office.

104 *Homestead Proof.*

Final affidavit required of homestead claimants, section 2291 of the Revised Statutes of the United States.

I, Thomas K. West, having made a homestead entry of the S. ½ S. E. ¼ sec. 12 & N. ½ N. E. ¼ section No. 13, in township No. 106, of range No. 49, subject to entry at Sioux Falls, D. T., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statutes of the United States, and for that purpose do solemnly — that I am an Indian of the Santte Sioux tribe and was born in the *in the* United States; that I have made actual settlement upon and have cultivated said land, having resided thereon since the 18th day of June, 1873, to the present time; that no part of said land has been alienated except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

THOMAS K. WEST.

I, J. M. Washburn, receiver of the land office at Sioux Falls, D. T., do hereby certify that the above affidavit was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN.

Homestead Proof—Testimony of Claimant.

THOMAS K. WEST, being called as a witness in his own behalf in support for his homestead entry for S. ½ S. E. ¼ sec. 12 and N. ½ N. E. ¼ sec. 13, t'p 106, R. 49, testifies as follows:

Quest. 1. What is your name? (Be careful to give it in full, correctly spelled, in order that it may be here written exactly as you wish it written in the patent which you desire to obtain.)

Ans. Thomas K. West.

Ques. 2. What is your age?

Ans. 38 years.

Ques. 3. Are you the head of a family or a single person; and, if the head of a family, of whom does your family consist?

Ans. Head of family, consisting of wife and four children.

Ques. 4. Are you a native-born citizen of the United States? If not, have you declared your intention to become a citizen and have you obtained a certificate of naturalization?

Ans. I am Santte Sioux Indian, formerly of the Sioux tribe; born in U. S.

Ques. 5. Are there any indications of coal salines or minerals of any kind on the land embraced in your homestead entry above described? (If so, state what they are and whether the springs or mineral deposits are valuable.)

105 Ans. No.

Ques. 6. Is the land more valuable for agricultural than mineral purposes?

Ans. It is.

Ques. 7. What is your post-office address?

A. Roscoe, D. T.

Ques. 8. Have you ever made a homestead entry except for this land, No. 4788? (If you have, give as nearly as you can the date thereof and description of the land, and state whether the entry still subsists, or, if it has been canceled, state the cause of cancellation.)

A. No.

Ques. 9. Have you sold the land or conveyed to any one your right and interest in the same; and, if so, to whom and for what purpose?

Ans. No.

Ques. 10. Does any one except yourself claim the land under the homestead or pre-emption laws?

Ans. No.

Ques. 11. When did you first make settlement on the said land?

Ans. June 18th, 1873.

Ques. 12. When did you first establish a residence upon the land?

Ans. June 18th, 1873.

Ques. 13. At the date you have given as being the date that you first established your residence upon the land did you move thereon in person?

Ans. I did.

Ques. 14. Up to what time have you resided on the land?

Ans. To present time.

Ques. 15. Was your residence upon the land continuous during the period named?

Ans. It was.

Ques. 16. If you had a family during said period of residence on the homestead did your family reside thereon?

Ans. They did.

Ques. 17. What improvements have you made or do you possess on the land? (Describe them.)

Ans. House 14 x 16 ft., stables, & 20 acres, broken.

Ques. 18. When was your house built?

Ans. June 18th, 1873.

Ques. 19. What is the total value of said improvements?

Ans. One hundred and fifty dollars.

Ques. 20. For what purpose have you used the lands?

Ans. Farming.

Ques. 21. How much of the land have you broken and cultivated, and what crops, if any, have you raised?

Ans. Twenty acres. Wheat, oats, and corn raised on same.
THOMAS K. WEST.

I hereby certify that each question and answer in the foregoing testimony was read to the claimant before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

106 *Homestead Proof—Testimony of Witness.*

JOHN C. REDNING, being called as a witness in support of the homestead entry of Thomas K. West for S. ½ S. E. ¼, sec. 12, and N. ½ N. E. ¼, sec. 13, t'p 106, R. 49, testifies as follows:

Ques. 1. What is your post-office address?
A. Flandreau, D. T.
Ques. 2. What is your occupation?
Ans. Farming.
Ques. 3. Are you well acquainted with Thomas K. West, the claimant in this case, and how long have you known him?
Ans. Known him over six years.
Ques. 4. How old do you — or believe claimant to be?
Ans. 38 years.
Ques. 5. Is claimant the head of a family or a single person; and, if the head of a family, of whom does the family consist?
Ans. Head of family, consisting of wife and 4 children.
Ques. 6. Is claimant a native-born citizen of the United States? If not, what steps has — taken to become a citizen? (State your knowledge in this regard.)
Ans. He is a Santte Sioux Indian, formerly of the Sioux tribe, born in the United States.
Ques. 7. Has claimant been an inhabitant of the land above described?
Ans. He has.
Ques. 8. Do you live in the vicinity of the land and are you acquainted with the same?
Ans. I do; am well acquainted with same.
Ques. 9. Are there any indications of coal, salines, or minerals of any kind on this land? (If so, state what they are and whether the springs or mineral deposits are valuable.)
Ans. No.
Ques. 10. Is the land more valuable for agricultural than mineral purposes?
Ans. It is.
Ques. 11. When did claimant first make settlement on the land?
Ans. June 18th, 1873.
Ques. 12. When did claimant establish a residence upon the land?
Ans. June 18th, 1873.
Ques. 13. Up to what time has claimant resided upon the land?
Ans. To present time.

Ques. 14. Has his residence been continuous during the period named?

Ans. It has.

Ques. 15. If claimant had a family during said period of residence, did the family reside on the land?

Ans. They did.

Ques. 16. When was the claimant's house built upon the land?

Ans. June 18th, 1873.

Ques. 17. What other improvements have been made on the land?

Ans. Twenty acres broken.

Ques. 18. What is the total value of the improvements?

107 Ans. One hundred and fifty dollars.

Ques. 19. For what purpose has the land been used by claimant?

Ans. Farming.

Ques. 20. How much of the land has been broken and cultivated and what crops, if any, have been raised?

Ans. Twenty acres broken; wheat, oats, and corn raised on same.

Ques. 21. Has claimant made a homestead entry for other land than that above described? (State your knowledge in this regard.)

Ans. I have no knowledge of him doing so.

Ques. 22. Has claimant alienated any portion of the land—that is, conveyed to some one else—and, if so, to whom and for what purpose? (State your knowledge in this regard.)

Ans. I have no knowledge that he has.

Ques. 23. Is it your belief that Thomas K. West, the claimant, has acted in good faith in the settlement and improvement of the said land as a homestead? Have you any knowledge to the contrary?

Ans. It is my belief that he has.

Ques. 24. Are you interested in this claim?

Ans. I am not.

JOHN C. REDNING.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimony was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

Homestead Proof—Testimony of Witness.

CHARLES HENRY, being called as a witness in support of the homestead entry of Thomas K. West for S. ½ S. E. ¼, sec. 12, and W. ½ N. E. ¼, sec. 13, t'p 106, R. 49, testifies as follows:

Ques. 1. What is your post-office address?

Ans. Roscoe, D. T.

Ques. 2. What is your occupation?

Ans. Farming.

Ques. 3. Are you well acquainted with Thomas K. West, the claimant in this case, and how long have you known him?

Ans. Known him over six years.

Q. — How old do you know or believe claimant to be?

Ans. 38 years.

Ques. 5. Is claimant *to* head of a family or a *sible* person; and, if the head of a family, of whom does the family consist?

Ans. Head of family, consisting of wife and 4 children.

Ques. 6. Is claimant a native-born citizen of the United States? If not, what steps has — taken to become a citizen? (State your knowledge in this regard.)

Ans. He is a Santte Sioux Indian, formerly of the Sioux tribe, born in the United States.

Ques. 7. Has claimant been an inhabitant of the land above described?

108 Ans. He has.

Ques. 8. Do you live in the vicinity of the land, and are you acquainted with the same?

Ans. I do; am well acquainted with same.

Ques. 9. Are there any indications of coal, salines, or minerals of any kind on this land? (If so, state what they are and whether the springs or mineral deposits are valuable.)

Ans. No.

Ques. 10. Is the land more valuable for agricultural than mineral purposes?

Ans. It is.

Ques. 11. When did claimant first make settlement on the land?

Ans. June 18th, 1873.

Ques. 12. When did claimant establish a residence upon the land?

Ans. June 18th, 1873.

Ques. 13. Up to what time has claimant resided upon the land?

Ans. To present time.

Ques. 14. Has his residence been continuous during the period named?

Ans. It has.

Ques. 15. If claimant had a family during said period of residence, did the family reside on the land?

Ans. They did.

Ques. 16. When was the claimant's house built upon the land?

Ans. June 18th, 1873.

Ques. 17. What other improvements have been made upon the land?

Ans. Twenty acres broken.

Ques. 18. What is the total value of the improvements?

Ans. One hundred and fifty dollars.

Ques. 19. For what purpose has the land been used by claimant?

Ans. Farming.

Ques. 20. How much of the land has been broken and cultivated, and what crops, if any, have been raised?

Ans. Twenty acres broken; wheat, oats, and corn raised on same.

Ques. 21. Has claimant made a homestead entry for other land than that above described? (State your knowledge in this regard.)

Ans. I have no knowledge of him doing so.

Ques. 22. Has claimant alienated any portion of the land—that is, conveyed it to some one else—and, if so, to whom and for what purpose? (State your knowledge in this regard.)

Ans. I have no knowledge that he has.

Ques. 23. Is it your belief that Thomas K. West, the claimant, has acted in good faith in the settlement and improvement of the said land as a homestead? Have you any knowledge to the contrary?

Ans. It is my belief that he has.

Ques. 24. Are you interested in this claim?

Ans. I am not.

THOMAS K. WEST.

109 I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimony was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTOF, D. C., *Nov.* 12, 1886.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copies of Sioux Falls, Dakota, homestead application No. 4788, receiver's final receipt No. 2995, and affidavit and final proof made by Thomas K. West are true and literal exemplifications of the original papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

110 To which offer the defendant then and there duly objected, for the reasons:

1. That the patent from the United States is the highest evidence of title in a suit of this nature, and its force and effect cannot be impeached by evidence of this character.

2. If the patentee was an Indian, and any inhibition did exist against him as to the want of power of alienation, the plaintiffs are not in a position to raise it in this action. The only parties that could do so *is* the United States, the grantor, or West, the grantee named in the patent.

3. The evidence sought to be introduced is incompetent and irrelevant, in this: It is not authorized under the law to be recorded and cannot be introduced to prejudice the title vested in the grantee,

West, named in the patent, and this evidence could not be introduced to vary the absolute terms of the patent itself.

But the court overruled the objection; to which ruling the defendants then and there severally duly excepted.

Whereupon the said record was received and read in evidence.

And the plaintiffs, to further maintain the issues on their part, offered and read in evidence the following patent from the United States, dated June 15, 1880, for the said land, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2295; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established
111 and duly consummated, in conformity to law, for the north half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of lands subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred — eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,

[SEAL.] By WM. H. CROOK, *Secretary.*

Recorded vol. 7, page 193.

S. W. CLARK,
Recorder of the General Land Office.

Whereupon the plaintiffs, after duly accounting for the loss of the originals, offered in evidence the following certified copy of a deed from said Thomas K. West and Sophia West, his wife, to one C. E. Thayer, dated June 17, 1885, in words and figures following, to wit:

(EXHIBIT C.)

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of twenty dollars to them in hand paid by C. E. Thayer, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, convey, and quitclaim unto the said party of the second part, his heirs and assigns forever, all their estate, right, title, and interest in and to the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

112 The south half of the southeast quarter of section twelve and north half of the northeast quarter of section thirteen, of township one hundred and six north, of range forty-nine west, of 5th P. M.; S. ½ S. E. —, 12, and N. ½ N. E. ¼, 13, 106, 49.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said parties of the second part, their heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals this 17th day of June, A. D. 1885.

THOMAS K. WEST. [SEAL.]
her
SOPHIA xx WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
A. J. SMITH.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 17th day of June, A. D. 1885, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

Witness my signature and notarial seal, hereunto affixed, the day and year last above written.

ARTHUR J. SMITH,
Notary Public.

[SEAL.]

Upon the back of which deed is the following endorsement:
Territory of Dakota, county of Moody, *ss:* Filed for record the 17th day of June, A. D. 1885, at 2.45 o'clock p. m., and recorded in Book 6 of Deeds, page 327. F. E. Muner, register of deeds.

And also the following certified copy of a deed from C. E. Thayer and Caddie, his wife, to the plaintiffs for the land described in the pleadings herein, dated June 19, 1885, in words and figures following, to wit:

(EXHIBIT D.)

Know all men by these presents that C. E. Thayer and Caddie E. Thayer, — wife, of Jerauld county, Territory of Dakota, parties of the first part, for and in consideration of the sum of five hun-
113 dred dollars, to them in hand paid by S. S. Taylor and S. A. Bidwell, parties of the second part, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, convey, and quitclaim unto the said parties of the second part, their heirs and assigns forever, all their estate, right, title, and interest in and to the following-described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit: The south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, of township one hundred and six north, of range forty-nine west, of 5th P. M.—S. ½ S. E. ¼ 12 and N. ½ N. E. ¼ 13, 106, 49:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said parties of the second part, their heirs and assigns forever.

In witness whereof the said parties of the second part have hereunto set their hands and seals this 19th day of June, A. D. 1885.

C. E. THAYER. [SEAL.]
CADDIE E. THAYER. [SEAL.]

Signed, sealed, and delivered in presence of—
A. J. SMITH.

TERRITORY OF DAKOTA, }
County of Moody. }

On this 19th day of June, A. D. 1885, before the undersigned, a notary public in and for said county, personally appeared C. E. Thayer and Caddie E. Thayer, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein named.

Witness my hand and notarial seal, hereunto affixed, the day and year last above written.

ARTHUR J. SMITH,
Notary Public.

[NOTARIAL SEAL.]

Upon the back of which said deed are the following endorsements:

Territory of Dakota, county of Moody. Filed for record this 27th day of June, A. D. 1885, at 10.30 o'clock a. m., and recorded in Book — of Deeds, on page —. F. E. Muner, register of deeds. Benj. Wyckoff, deputy.

114 To each of which offers the defendants then and there severally objected for the reason that it is not shown that said West at the time of the making and delivery of said deed was in actual possession of said premises described therein, and that the said premises was not in his possession and was held by the defendants, claiming under title adverse to said West.

Whereupon the plaintiffs' counsel then and there agreed that at the time of making and delivering said deed said West was not in possession of said land, so that defendants can raise that question of adverse possession squarely on the admission.

And the defendants also severally make the same objection to the said deed from Thayer and wife.

And the said plaintiffs, to further maintain the issues on their part, called as a witness the defendant TIMOTHY YOUNG, who testified as follows:

I am one of the defendants in this action; have resided in Dakota eight years since last June; am acquainted with Thomas K. West; have seen him several times; have known him in the neighborhood of four years.

The plaintiffs thereupon called as a witness the plaintiff S. A. BIDWELL, who testified as follows:

I have lived in Dakota six years. I know Thomas K. West.

And being asked by plaintiffs' counsel what nationality or race was Thomas K. West, the defendants severally duly objected for the reason that such evidence is incompetent and irrelevant under the issues in the case, and for the same reason stated in the objection to the introduction of the records from the General Land Office.

But the court overruled the objection; to which ruling the defendants then and there duly excepted.

115 The witness thereupon, under said objection, stated: "He is a Sioux Indian. He is not a white man."

Whereupon RODGER BRANNAN was called and sworn as a witness on behalf of the plaintiffs and testified as follows:

I know Thomas K. West; have known him nearly nine years.

And was thereupon asked by plaintiffs' counsel of what race is Thomas K. West.

To which the defendants then and there severally duly objected for the same reason as stated in the last objection.

But the court overruled said objection and the defendants then and there severally duly excepted.

The witness thereupon answered, under said objection, that said West was a Sioux Indian.

The plaintiffs, with the agreement that defendants' counsel would introduce the deed from West to defendant Young, rested their case.

And the defendant TIMOTHY YOUNG, to maintain the issues on his part, testified as follows:

I am the Timothy Young mentioned in the complaint and answer in this action.

The witness was thereupon shown the following warranty deed, dated June 25, 1881, to the southwest quarter of the southeast quarter of section 12, township 106, range 49, being a part of the land described in said pleadings and patent from the said Thomas K. West and Sophia, his wife, to the said Timothy Young, and stated that "I am the person named in said deed."

Whereupon said deed was offered and read in evidence, and is in words and figures following, to wit:

(EXHIBIT E.)

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county and Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, to wit:

The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey:

116 To have and to hold the same, together with all the hereditaments thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, his heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said part- of the first part will warrant and defend.

And the said Sophia West hereby relinquishes her right of dower in and to the above-described premises.

In testimony whereof the said parties of the first part have here-

unto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN,
GUY C. WETMORE,
Witnesses.

TERRITORY OF DAKOTA, } *ss:*
County of Moody, }

On this 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, his wife, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned; and the said Sophia West, wife of the said Thomas K. West, on a private examination apart from and without the hearing of her said husband, being by me first made acquainted with the contents and meaning of the foregoing deed, thereupon acknowledged to me that she executed the same freely and understandingly, without fear or compulsion of her said husband or any other person, and that she does not wish to retract the same.

Witness my signature and official seal, hereunto affixed, the day and year last above written.

ALFRED BROWN,
[L. S.] *Notary Public.*

Upon the back of which said deed are the following endorsements: Thomas K. West & wife to Timothy Young. Territory of Dakota, county of Moody, *ss:* Filed for record the 27th day of Jan'y, A. D. 1881, at 10 o'clock a. m., and recorded in Book 2, on page 225. Hans Olson, register of deeds.

117 Whereupon the said witness was shown the following deed to the whole of said land described in said patent, dated June 15, 1885, from said Thomas K. West and Sophia, his wife, to said Timothy Young, and stated that I am the Timothy Young mention- in said deed.

Whereupon the said deed was offered and read in evidence, and is in words and figures following, to wit:

(EXHIBIT F.)

This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young,

of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land, situate in the county of Moody and Territory of Dakota, and known and described as follows, to wit:

The south half of the southeast quarter of section No. twelve (12) and the north half of the northeast quarter of section No. thirteen (13), all in township No. one hundred and six (106) north, of range No. forty-nine (49) west, of 5th principal meridian:

To have and to hold the above quitclaimed premises, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark

Signed, sealed, and delivered in presence of—
JOHN EASTMAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

On this 15th day of June, in the year one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to *the* that they executed the same.

ALFRED BROWN,
Justice of the Peace for Moody Co., D. T.

118 Upon the back of which said deed are the following endorsements: Quitclaim deed. Office of register of deeds, county of Moody, D. T. I hereby certify that the within deed was filed in this office for record on the 15th day of June, A. D. 1885, at 8 o'clock a. m., and was duly recorded in Book 6 of Deeds, page 322. F. E. Minier, register of deeds.

Thereupon the witness further testified: That I paid to said Thomas K. West $275 for the 40 acres described in the deed dated January 25, 1881, the southwest quarter of the southeast quarter of

section 12, township 106, range 49. I now live on this 40 acres I have just described. I have lived there ever since April, 1882, and am residing there now. I made the following improvements on this 40 acres on which I live: The dwelling-house is an upright, 16 x 22 feet, with 12-ft. posts and an "L" 14 x 16, and a summer kitchen and coal-house. The summer kitchen and coal-house is 12 x 16, with a stone foundation under the balance of the house, all finished inside and out, painted inside and out, with two good chimneys upon it. I built the upright part about 8 years ago and moved it on to this 40 the summer I moved onto the place. I built the rest of the house and cellar and completed it. The building could not be built for less than $1,500. I built a barn on this 40—48 x 24 feet; it cost about $500. The other improvements I made on the premises consists of a chicken-house, corn-crib, hog-house, a good well and pump in it. The corn-crib is worth $30. The other improvements that I made on the place, aside *aside* from what I above mentioned, are worth $500. I have some trees, some ornamental trees, &c., growing on the place, worth $50 as they stand. I have got about one-half
119 of this 40 broken. This enhances it- value from $2.50 to $3.50 an acre. I would say $50. I have also a temporary stable 16 x 32 feet included in the above description. It is built of 2 x 6 studding, with good boards, which is worth $50. The only other improvement is an out-house, shingle roof, worth $50. The value of the above 40 acres is $50 an acre without the improvements. The first improvements, including the upright part of the house, was put on shortly after I got the first deed, in 1881. I went to work on the other improvements right along after I moved there, excepting the corn crib. I built that this fall. These improvements were built along in 1882 and 1883. I put them all on in good faith and fixed up a home for myself for my old days. They were put on after I obtained this first deed that I have described, under that deed. I put my improvements on there because I wanted to fix up a home for myself. I concluded that I had got title and wanted to fix it up to suit myself.

The witness is thereupon asked the following questions:

Q. I will ask you whether or not since you have moved on there, in 1882, you have been in actual possession, the sole possession, of this piece of land—this 40 acres.

Plaintiffs' counsel thereupon concedes that Mr. Young has been in possession of that piece of land from the time he purchased it, in 1881, until the present time.

I paid Thomas K. West for the deed dated June 15, 1885, for the whole land described in the patent, $900 in cash. I was in possession of the south half of the southeast quarter of section 12 and the north half of the northeast quarter of section 13, township 106, range 49, in Moody county, Dakota, on the 17th day of June, 1885. I was in possession of the same land on the 19th of June,
120 1885, up to and including June 27, 1885. I was living on it, and nobody else was living on it but me. Thomas K. West

was not in possession of any of that land on the 17th of June, 1885. C. E. Thayer was not in possession of that land between the 17th day and the 27th day of June, 1885. Neither of the plaintiffs in this case have been in possession of this land.

On cross-examination by plaintiffs' counsel the witness testified that he paid $275 for the first deed from West; that he was acquainted with West at that time; that he paid him the money; that he could not say whether West was an Indian or not; that he was not very white. I thought I had a good title to that land when I built the house and everything on it. I put these improvements on under that idea.

Question by plaintiffs' counsel:

Q. What did you get another deed for on the 17th day of June, 1885, if you thought the other was all right?

A. After awhile there began to be kind of a little agitation about it. It looked as though I had to have a second deed then. I heard it talked that the first title was not of any account. I don't know exactly what was the matter with the first title. I thought it was wrong because everybody else thought so. I heard there was something wrong about Indian titles.

Plaintiffs' counsel thereupon asked the witness the following question:

Q. Then you did know when you took this second deed and did know during this time that it was a question of Indian title, and that you had got that title from an Indian, didn't you, Mr. Young?

Defendants' counsel objected for the reason that said evi-
121 dence was incompetent, but the court overruled the objection, and defendants then and there severally duly excepted.

I don't know whether he was an Indian or not; that was the talk. He dressed in citizen's clothes. I would not swear that he is an Indian now. I thought I would have a second deed on the grounds that everybody was saying the first deed was not good. I claimed to own but 40 acres till I got the last deed. Mr. Bidwell claimed to own 40 — of the land described in the patent; Mr. Brown, 80 acres of it. Mr. Bidwell has some breaking on his 40. I did not claim to have any possession of the Bidwell 40 until this time. I got the deed for the whole 160 acres.

Whereupon the defendant Alfred Brown, to maintain the issues upon his part, testified as follows:

I am one of the defendants in this action; I reside in Egan, Moody county; have resided there about nine years; that he did not have in his possession a deed from said Thomas K. West to Sophie Weston of the north half of the northeast quarter of section 13, T. 146, R. 49, dated August 13, 1881. I tried to procure the original, but could not find it.

Whereupon the defendant offered and read in evidence the following certified copy thereof in words and figures following, to wit:

(EXHIBIT G.)

Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, part- of the first —, for and in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, part- of the second part, the receipt whereof is hereby acknowledged, do- grant, bargain, sell, and convey unto the said party of the second part — her assigns forever the following real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty-nine:

To have and to hold the same, together with all the here-
122 ditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In witness whereof the said party of the first part has hereunto set his hand and seal this thirteenth day of August, A. D. 1881.

THOMAS K. WEST. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. ENO.
CHAS. H. PETTIT.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. Weston, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

[NOTARIAL SEAL.]

J. H. ENO,
Notary Public.

Upon the back of which said deed are the following endorsements: Warranty deed. Thomas K. West to Sophia Weston. Territory of Dakota, Moody county. Filed for record the 7th day of October, 1881, at 9 o'clock and — minutes a. m. Recorded in Book 2 of Deeds, on page 341. Hans Olson, register of deeds.

The witness is thereupon shown a deed dated the 15th of August, 1881, from said Sophia Weston to said Alfred Brown for the same land, and stated: "I am the Alfred Brown mentioned in the deed. I knew Sophia Weston at that time. She was the wife of the said Thomas K. West. This Sophia was the wife of Thomas K. West, and is the same person as Sophia West. I thought
123 her name was Sophia Weston when I got the deed."

Whereupon defendants' counsel offered and read said deed in evidence, which is in words and figures following, to wit:

Know all men by these presents that Sophia Weston, of Moody county and Territory of Dakota, party of the first part, for and — consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen (13), town. one hundred and six (106), range forty-nine (49):

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and that the said Sophia Weston, party of the first part, for *his* heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of *of* the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WESTON. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
J. H. ENO.
JOSEPH CARROW.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Sophia Weston, to me personally known to be the identical person who — described in and who executed the foregoing deed as grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

J. H. ENO,
Notary Public.

On the back of which deed are the following endorsements: Warranty deed. Sophia Weston to Alfred Brown. Territory of Dakota, Moody county, ss. Filed for record the 17th day of August, A. D. 1881, at 11.45 o'clock a. m., and recorded in Book 2, on page 315. Hans Olson, register of deeds.

124 I paid $300 in cash for this 80 acres of land and took possession of it immediately after the making and delivery of said deed. I broke some on this 80 and have raised crops on it ever since. I broke 30 acres or more. I broke some next season immediately after I took possession. I took some few trees that was on it and transplanted them. I broke some for one or two seasons afterwards. I don't remember just when the br-aking was done. I cropped it ever since and cut the grass every season where I was not raising grain. I am acquainted with the defendant Young. I am acquainted with the southwest quarter of the southeast quarter of section 12, T. 146, range 49. Timothy Young resides on there, and his wife. I have been over there frequently. The value of this 40 acres, outside of the improvements that are on it, is about $2,000. I have resided at Egan ever since the town was laid out. My business is farming, justice of the peace, and selling land. I deal in real estate and loaning money. I was one of the town proprietors in laying out the town about five or six years ago. I know the value of real estate in this neighborhood. The value of all the improvements on that 40 is about $1,900 or $2,000. The value of the 40 with the improvements would be as much as $3,900 to $4,000. I broke 30 acres on my 80 at different times. I think it was two or three years ago that I made the improvements. The value of this particular land without the improvements is about $40 an acre. The value of the improvements is worth $200; that would make the 80 worth about $3,400. I went into possession of this land at the time of the delivery of this deed, on the 14th day of August, 1881. Said Thomas K. West and Sophia West were not in possession of — foot of that 160 acres on the 17th day of June, 1885.

125 C. E. Thayer never had possession of a foot of the whole 160 acres, nor did either of the plaintiffs. Bidwell might have walked over it. I don't know that Taylor ever stepped his

foot on it. He threatened to go and cut my crop. I told him there would be a funeral if he did.

Cross-examination by plaintiffs' counsel:

Bidwell did some breaking on 40 acres of this 160. I never knew him to step his foot on it since Young did. He claimed to own 40 acres of the 160 before that time. Sophia Weston is Thomas K. West's wife; she passes as such. I know them both by sight.

Plaintiffs' counsel thereupon asked the following question:

Q. What race were they?

To which the defendants severally duly object, for the reason that the evidence is incompetent, making the same objection as heretofore; but the court overruled the objection; to which ruling the defendants then and there duly excepted.

The witness thereupon answered that West appeared to have some Indian blood in him. He bore the general reputation of being an Indian. He wore citizen's clothes, voted, and all that sort of thing at elections. We knew that Young was going to get another deed, if he could, before the other parties got one. They had offered $800 for it, and was keeping this man secreted, so as to get a deed before we did. They tried to get it before we did, and we succeeded in getting it. The object in getting this deed was to get a more sure and perfect title than we had, for the reason, in 1875, I think, there appeared to be a law passed that these Indians should hold their land
a certain length of time before they could convey a perfect
126 title; that for the reason of avoiding this law we sought to get a second deed, and if these parties had done what they agreed to there would never have been any lawsuit here.

Mr. Young and I talked it all over, and so did Bidwell and me talk it over. We had a positive agreement that it should go to George Smith and he should deed to the several parties. We was to deed the land that each one claimed to him. We wanted to get it just as soon as the 5 years had expired, but they had him kept hid. They thought we could not find him, but we did find him and got a deed. I supposed he had Indian blood in him and supposed the law cut some figure or might.

On redirect examination the witness testified that—

This other person was Bidwell, one of the plaintiffs in this case. We had an agreement with him. The agreement was that myself and Young and Bidwell was to get this deed on the 15th.

Whereupon both parties rested their case.

And said cause having been duly argued by the counsel for the respective parties and submitted to the court for determination, the said Timothy Young requested the court to make and find the following findings of fact and conclusions of law:

127 TERRITORY OF DAKOTA, } ss.
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.
} Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs and J. H. Eno and Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein, and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Timothy Young:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "to secure
128 homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated, in conformity to law, for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is, therefore, granted by the United

States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of Deeds, on page 193.

II.

That on the 25th day of January, A. D. 1881, said Thomas K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota
129 Territory, for the consideration of two hundred and seventy-five ($275.00) dollars, the same being a part of the land mentioned and described in the said patent to the said Thomas K. West, and which said deed was duly recorded in the office of the register deeds of Moody county, Dakota, on the 27th day of January, A. D. 1881, at 10 o'clock a. m., in vol. 2 of Deeds, on page 225, of which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-de-

scribed real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or part thereof the said parties of the first — will warrant and defend; and said Sophia West hereby relinquishes her right of dower in and to the above-described premises.

In testimony whereof *that* said parties of the first part have hereunto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]

her
SOPHIA WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN.
GEO. C. WESTRAM.

TERRITORY OF DAKOTA, }
—— *County.* }

On the 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, his wife, to me personally known
130 to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

And the said Sophia West, wife of the said Thomas K. West, on a private examination apart from her said husband, acknowledged to me the contents and meaning of the foregoing deed, being fully made known to her; that she signed the same freely and understandingly, without fear or compulsion of her said husband or any other person.

Witness my signature and official seal hereto affixed the day and date last above written.

ALFRED BROWN,
[SEAL.] *Notary Public.*

III.

That the defendant Timothy Young entered into actual possession of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), on or about the 25th day of January, A. D. 1881, claiming it in his own right and title thereto in good faith under said deed mentioned in finding No. 2 aforesaid, and the said defendant has ever since the date last aforesaid occupied, used, and cultivated said land, having and keeping the same by substantial enclosure, using and claiming the same in his own right from said date to the present time, adversely to all the world, and especially as against the said plaintiffs, and has erected and made permanent improvements thereon, and that the value of the said improvements, aside from the value of said land, is two thousand five hundred ($2,500.00) dollars.

IV.

That the value of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), aside from the value of the improvements thereon, is two thousand ($2,000.00) dollars.

V.

That on the 15th day of June, A. D. 1885, the said Thomas
131 K. West, mentioned in said patent, and Sophia West, his wife, granted to the defendant Timothy Young the said south half of the southeast quarter of section twelve (12), the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of nine hundred dollars, and on said last-mentioned date the said defendant entered into the actual possession of all of the said premises, claiming it in his own right and title thereto, and the said defendant has, ever since the date last aforesaid, occupied and used the said land and has been and remained in actual possession of the whole of said premises, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs, which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 15th day of June, A. D. 1885, at 8 o'clock a. m., in Book 6 of Deeds, pages 322 and 323, of which said deed the following is a copy, to wit:

This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young, of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars, in hand paid by the said party of

the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land situated in the county of Moody and Territory of Dakota and known and described as follows, to wit:

The south half of the southeast quarter of section No. twelve (12) and the north half of the northeast quarter of section No. thirteen (13), all in township No. one hundred and six (106) north, of range No. forty-nine (49) west, of 5th principal meridian:

132 To have and to hold the above quitclaimed premises, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN EASTRAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, }
County of Moody, } *ss:*

On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to me that they executed the same.

ALFRED BROWN,
Justice of the Peace, Moody Co., D. T.

VI.

That the said Thomas K. West and Sophia West, from the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer mentioned in the amended complaint herein, *was* not in the actual possession or otherwise of the said real property mentioned and described in the 5th finding of fact herein or any part thereof.

VII.

That the said C. E. Thayer or Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, was not, on the 19th day of June,

A. D. 1885, or at any other time prior to or since said date, and at the time of the delivery of said deed to the said plaintiffs mentioned in the amended complaint herein, in the actual possession of the real property mentioned and described in the 5th finding of fact or any part thereof.

133 VIII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 5th finding of fact herein since and long prior to the 15th day of June, A. D. 1885, and that the defendant first entered upon said premises justly and lawfully and not as a trespasser as against the rights of any or either of said plaintiffs or of those under or through whom they claim.

As conclusions of law from the foregoing facts, the court now hereby finds and decides—

I.

That the defendant Timothy Young is the owner in fee simple and entitled to the possession of all the tracts and parcels of land mentioned and described in the amended complaint herein, to wit:

The south half of the southeast quarter of section twelve (12) and the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), Moody county, D. T., as against the plaintiffs, all and severally, and all persons claiming or to claim the same or any part of said land under them, the said plaintiffs, or either of them, and that neither one of said plaintiffs has any right, title, or interest in or to said land or any part thereof.

II.

That the defendant Timothy Young is entitled to a decree, as prayed for in his answer, to declare invalid and of no effect
134 the said deed to the said plaintiffs and the deed to grantor or predecessor of the said plaintiffs, and to quiet his title to said land against said plaintiffs and each of them and all persons claiming or to claim the same or any part thereof under or through the said plaintiffs or either of them.

III.

That the defendant Timothy Young is entitled to a judgment for costs to be taxed herein.

And judgment is hereby ordered to be entered accordingly.

(Endorsed:) District court, Moody county. S. S. Taylor *et al. v.* Alfred Brown *et al.* Copy of findings presented to the court for Timothy Young. Eno & Gamble Bros., att'ys for def'ts. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

135 But the court refused to find, as requested by said defendant, the third, fifth, seventh, and eighth findings of fact as above set forth, and also refused to make and find the first, second, and third conclusions of law as requested by said defendant Young, above set forth, and thereupon said defendant Young at the proper time duly made and entered the following exceptions thereto.

The said defendant excepts to the refusal of the court:

1. To make and find the third finding of fact as proposed by said defendant Young.

2. To the refusal of the court to make and find the fifth finding of fact as proposed by said defendant Young.

3. To the refusal of the court to make and find the seventh finding of fact as proposed by said defendant.

4. The said defendant Young excepts to the refusal of the court to make and find the eighth finding of fact as proposed by said defendant.

5. The said defendant Young excepts to the refusal of the court to make and find the first conclusion of law requested by said defendant.

6. The said defendant Young excepts to the refusal of the court to make and find the second conclusion of law requested by said defendant.

7. The said defendant Young excepts to the refusal of the court to make and find the third conclusion of law requested by said defendant.

And thereupon the said court did make and find the following findings of fact and conclusions of law:

136 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Findings by the Court.

This cause having been called regularly for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs, and J. H. Eno & Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein, and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issue in this case as to the defendant Timothy Young:

Findings of Fact.

(I.)

That a patent was issued by the United States to one Thomas K. West, for the premises therein described, on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

137 Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

138 In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 7, page 193.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of Deeds, on page 193.

(II.)

That on the 25th day of January, A. D. 1881, said Thomas K. West mentioned in said patent and Sophia West, his wife, granted to the defendant Timothy Young the southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration, as expressed in the deed, of two hundred and seventy-five ($275) dollars, the same being a part of the land mentioned and described in the patent to the said Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota, on the 27th day of January, A. D. 1881, at 10 o'clock a. m., in vol. 2 of Deeds, on page 225,
139 of which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey; to have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, his heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the first — will warrant and defend.

And said Sophia West hereby relinquishes her right of
140 dower in and to the above-described premises.

In testimony whereof the said parties of the first part hav

hereunto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN.
GEO. C. WESTMAN.

TERRITORY OF DAKOTA, }
—— *County.* }

On this 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, his wife, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

And the said Sophia West, wife of the said Thomas K. West, on a private examination apart from her said husband, acknowledged to me, the contents and meaning of the foregoing deed being fully made known to her, that she signed the same freely and understandingly without fear or compulsion of her said husband or any other person.

Witness my hand and official seal hereto affixed the day and date last above written.

ALFRED BROWN,
Notary Public.

[SEAL.]

141 (III.)

That the defendant Timothy Young entered into actual possession of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), on or about the 25th day of January, A. D. 1881, claiming it in his own right and title thereto under said deed mentioned in finding No. 3 aforesaid, and the said defendant has ever since the date last aforesaid occupied, used, and cultivated said land (having and keeping the same by substantial enclosures), using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs, and has erected and made permanent improvements thereon, and that the value of the said improvements aside from the value of said land is two thousand ($2,000.00) dollars.

(IV.)

That the value of the said southwest quarter of the southeast quarter of section twelve (12), township one hundred and six (106), of range forty-nine (49), aside from the value of the improvements thereon, is two thousand (2,000.00) dollars.

(V.)

That on the 15th day of June, A. D. 1885, the said Thomas K. West mentioned in said patent and Sophia West, his wife, granted to the defendant Timothy Young the said south half of the southeast quarter of section twelve (12), the north half of the northeast quarter of section thirteen (13), all in township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration, as expressed in the deed, of nine
142 hundred dollars, and on said last-mentioned date the said defendant entered into the actual possession of all of the said premises, claiming it in his own right and title thereto, and the said defendant has ever since the date last aforesaid occupied and used the said land and has been and remained in actual possession of the whole of the said premises, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 15th day of June, A. D. 1885, at 8 o'clock a. m., in Book 6 of Deeds, pages 322 and 323, of which said deed the following is a copy, to wit:

This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young, of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land, situated in the county of Moody and Territory of Dakota, and known and described as follows, to wit: The south half of the southeast quarter of section No. twelve (12) and the north half of the
143 northeast quarter of section No. thirteen (13), all in township one hundred and six (106) north, of range No. forty-nine (49) west, of the 5th principal meridian; to have and to hold the above-quitclaimed premises, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN EASTMAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, }
County of Moody, } ss:

On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to me that they executed the same.

ALFRED BROWN,
Justice of the Peace, Moody Co., D. T.

144 VI.

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer mentioned in the amended complaint herein, was not in the actual possession or otherwise of the said real property mentioned and described in the 3rd finding of fact herein or any part thereof.

VII.

That the said C. E. Thayer or Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, was not, on the 19th day of June, A. D. 1885, or at any other time prior to or since said date, and at the time of the delivery of said deed to the said plaintiffs mentioned in the amended complaint herein, in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

VIII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 5th finding of fact herein since and long prior to the 15th day of June, A. D. 1885.

IX.

That Thomas K. West was a Sioux Indian who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of such abandonment by taking an oath of allegiance to the United States Government, and who was entitled, under sections 15 and 16 of chapter 131 of the Laws
145 of the United States, passed March 3rd, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30th, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States and had entered said land under said laws and duly proved up on the same and received the patent referred to in finding I of said land.

X.

That Sophia Weston's real name was Sophia West, and she was the wife of Thomas K. West, the patentee in the patent before referred to.

XI.

That on the 19th day of June, 1885, C. E. Thayer and his wife made, executed, and delivered to the plaintiffs in this action a deed for the premises described in said patent.

XII.

That all of the deeds to Alfred Brown, Sophia West, and Timothy Young were made within 5 years from the date of the patent to Thomas K. West by the United States.

XIII.

That the adverse possession of Alfred Brown and Timothy Young is entirely founded on conveyances that are absolutely null and void.

XIV.

That the possession of Alfred Brown and Timothy Young of said premises and the improvements made thereon by them were made with full notice that Thomas K. West was an Indian as described in finding IX.

And the court makes the following conclusions of law:

(I.) That the land described in said patent was absolutely
146 inalienable prior to the 16th day of June, 1885; that the deeds from Thomas K. West to Timothy Young, of January 15th, 1881, June 15th, 1885, and from Thomas K. West to Sophia West, of August 15th, 1881, and from Sophia West to Alfred Brown, of August 15th, 1881, are null and void.

(II.) That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell are good and valid conveyances and conveyed the title of said premises to the said plaintiffs.

(III.) That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises. Let judgment be entered accordingly.

By the court:

C. S. PALMER, *Judge.*

Filed Jan. 27, 1887.

JAMES WILSON,
Clerk of the District Court, Moody County, Dakota.

147 And thereupon and within the proper time said defendant, Timothy Young, duly made and entered the following exceptions to said findings of fact and conclusions of law:

148 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants

And now comes the defendant Timothy Young at the proper time and for himself and severally excepts to each of the findings of fact found by the court herein, and to each and every part of said findings, and the said defendant, Timothy Young, further specifically excepts thereto as follows:

I. To the ninth finding of fact and to each and every part thereof, for the reason that the said U. S. patent is absolute on its face and conveys the fee-simple title to the said Thomas K. West, the patentee therein named, without any conditions or restrictions whatever, and the fact as to whether said West was an Indian or had abandoned his tribal relations or had made declaration and proof as in said finding stated could not be introduced in evidence or found by the court to affect the title of the grantee of the said West, to wit, the said defendant Young in this action.

II. To the eleventh finding of fact and to each and every part thereof, for the reason that said West, prior to the execution of said alleged deed to Thayer, had parted with the whole of his title to said land and did not own or possess the same or any part thereof, and that all of said property described in said deed to Thayer and in said patent was then held adversely to the said Thayer and to the plaintiffs in this action by the said defendant Young.

III. To the twelfth finding of fact and to each and every
149 part thereof, for the reason that said deed, dated June 15, 1885, made by said West to the said defendant Young was not within five years from the date of said patent and was not within any limitation of the said statute of the United States.

IV. To the thirteenth finding of fact and each and every part thereof, for the reason that said finding is a conclusion of law and is contrary to law and the evidence in the case, and that said deeds to the said defendant Young were legal and valid.

V. To the fourteenth finding of fact and to each and every part thereof, for the reason that said deeds to said Young were legal and valid, and that if notice that said West was an Indian is material such fact was not alleged in plaintiffs' amended complaint.

VI. And the said defendant Young severally excepts to each of said conclusions of law and to each and every part of said conclusions.

VII. And the said defendant Young further specifically excepts to the first conclusion of law, for the reason that said land was alienable prior to June 16, 1885, and that said deeds to this defendant Young were legal and valid.

VIII. To the second conclusion of law and to each and every part thereof, for the reason that said deed of West to Thayer and from Thayer and wife to the plaintiffs were invalid and illegal because said West had theretofore parted with the whole of his title to said land, and that said deeds were void because said land was held adversely by this defendant against said Thayer and the said plaintiffs.

IX. To the third conclusion of law and to each and every part thereof, for the same reasons stated in the exception to the sec-
150 ond conclusion of law and for the reason that said conclusion is not sustained by the evidence or by the said findings of fact of the judge, because the evidence shows from said patent and from said deeds of West and wife to the defendant Young that said Young is the sole owner of said premises described in said patent, and that said West had no title thereto at the time he made the said deed to Thayer, and that said property was held adversely by this defendant, as stated in the exception to the said second concluion of law.

Dated Feb. 16, 1887.

J. H. ENO & GAMBLE BROTHERS,
Attorneys for Defendant Young.

151 This cause having been argued by counsel and submitted to the court for determination as aforesaid, the defendant Alfred Brown, within the proper time, duly requested the court to make and find the following findings of fact and conclusions of law:

152 TERRITORY OF DAKOTA, } *ss:*
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.
} Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs, — J. H. Eno and Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Alfred Brown:

Findings of Fact.

I.

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office
153 at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consummated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of land subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is, therefore, granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*

Recorded vol. 7, page 193.

S. W. CLARK,
Recorder of the General Land Office.

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in volume 7 of Deeds, on page 193.

II.

That on the 13th day of August, A. D. 1881, the said Thomas K. West, mentioned in said patent, granted to Sophia West, in the name of Sophia Weston, the north half of the northeast quarter of section thirteen (13) (*13*), township one hundred and six (106), of range forty-nine, in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, the same being a part of the land mentioned and described in said patent to Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, in volume 2 of Deeds, on page 341, of which said deed the following is a copy, to wit:

154

Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, party of the second part, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty-nine:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal this thirteenth day of August, A. D. 1881.

THOMAS K. WEST. [SEAL.]

Signed, sealed, and delivered in presence of—

J. H. ENO,
J. H. PETTIT,
Witnesses.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

J. H. ENO,
Notary Public.

155 III.

That on the 15th day of August, A. D. 1881, the said Sophia West, in the name of Sophia Weston, granted to the defendant Alfred Brown the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 17th day of August, A. D. 1881, in volume 2 of Deeds, page 315, of which said deed the following is a copy, to wit:

Know all men by these presents that Sophia Weston, of Moody county and Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen, town. one hundred and six (106), range forty-nine (49):

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Sophia Weston, party of the first part, for her heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances; and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
J. H. ENO,
JOSEPH GARSON,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

156 Be it remembered that on this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Sophia Weston, to me personally known to be the identical person who is described in the foregoing deed as grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereto affixed the day and date last above written.

J. H. ENO,
[SEAL.] *Notary Public.*

IV.

That the defendant Alfred Brown entered into actual possession of the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), on or about the 15th day of August, A. D. 1881, claiming it in his own right and title thereto in good faith under said deed mentioned in finding No. 3 aforesaid; occupied, used, and cultivated said land, using and claiming the same in his own right, from said date to the present time adversely to all the world, and especially as against the said plaintiffs.

V.

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer, mentioned in the amended complaint herein, was not in the actual possession or otherwise of the said real property mentioned in the 4th finding of fact herein or any part thereof.

VI.

That the said C. E. Thayer or Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, was not on the 19th day of June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said plaintiffs
157 mentioned in the amended complaint herein in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

VII.

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 3rd finding of fact herein, and that the defendant first entered upon said premises justly and lawfully and not as a trespasser as against the rights of any or either of said plaintiffs or of those under or through whom they claim.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

I.

That the defendant Alfred Brown is the owner in fee simple and entitled to the possession of the tract and parcel of land mentioned and described in the amended complaint herein, to wit:

The north half of the northeast quarter of section thirteen (13), in township one hundred and six (106), of range forty-nine (4-), Moody county, D. T., as against the plaintiffs all and severally and all persons claiming or to claim the same or any part of said land under them, the said plaintiffs, or either of them, and that neither one of said plaintiffs has any right, title, or interest in or to said land or any part thereof.

II.

That the defendant Alfred Brown is entitled to a decree as prayed for in his answer to declare invalid and of no effect the said
158 deed to the said plaintiffs and the deed to grantor or predecessor of the said plaintiffs and to quiet his title to said land against said plaintiffs and each of them and all persons claiming or to claim the same or any part thereof under or through the said plaintiffs or either of them.

III.

That the defendant Alfred Brown is entitled to a judgment for costs to be taxed herein.

And judgment is hereby ordered to be entered accordingly.

159 But the court refused to find, as requested by said defendant, the fourth and seventh findings of fact and the first, second, and third conclusions of law, as above set forth, by the said defendant Alfred Brown, and thereupon said defendant Brown at the proper time duly made and entered the following exceptions thereto.

The said defendant excepts to the refusals of the court:

I. To make and find the fourth finding of fact as proposed by said defendant Brown.

II. To the refusal of the court to make and find the seventh finding of fact as proposed by said defendant Brown.

III. The said defendant excepts to the refusal of the court to make and find the first conclusion of law requested by said defendant Brown.

IV. The said defendant excepts to the refusal of the court to make and find the second conclusion of law requested by said defendant Brown.

V. The said defendant excepts to the refusal of the court to make and find the third conclusion of law requested by said defendant Brown.

And thereupon the said court did make and find the following findings of fact and conclusions of law:

160 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.
} Findings by the Court.

This cause having been regularly called for trial before the court, a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs, and J. H. Eno & Gamble Brothers as attorneys for the said defendants Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and the court having heard the proof of the respective parties and considered the same and the records and papers in the case and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now separately finds the following facts under the issues in this case as to the defendant Alfred Brown:

Findings of Fact.

(I.)

That a patent was issued by the United States to one Thomas K. West for the premises therein described on the 15th day of June, A. D. 1880, in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

161 To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress, approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas K. West has been established and duly consum-ated in conformity to law for the south half of the southeast quarter of section twelve and the north half of the northeast quarter

of section thirteen, in township one hundred and six, of range forty-nine, in the district of lands subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of the courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

162 In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 15th day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES,
By WM. H. CROOK, *Secretary.*

Recorded vol. 7, page 193.

S. W. CLARK,
[L. S.] *Recorder of the General Land Office.*

Which said patent was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, at 9 o'clock a. m., in vol. 7 of Deeds, on page 193.

(II.)

That on the 13th day of August, A. D. 1881, the said Thomas K. West, mentioned in said patent, granted to Sophia West, in the name of Sophia Weston, the north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of three hundred ($300.00) dollars, the same being a part of the land mentioned and described in said patent to Thomas K. West, and which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory, on the 7th day of October, A. D. 1881, in volume 2 of Deeds, on page 341, of

163 which said deed the following is a copy, to wit:

Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, party of the first part, for and

in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty-nine:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal this 13th day of August, A. D. 1881.

THOMAS K. WEST. [SEAL.]

164 Signed, sealed, and delivered in presence of—
J. H. ENO,
J. H. PETTIT,
Witnesses.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

J. H. ENO,
Notary Public.

(III.)

That on the 15th day of August, A. D. 1881, the said Sophia West, in the name of Sophia Weston, granted to the defendant Alfred Brown the said north half of the northeast quarter of section thirteen (13), township one hundred and six (106), of range forty-nine (49), in Moody county, Dakota Territory, for the consideration of three hundred dollars ($300.00), which said deed was duly recorded in the office of the register of deeds of Moody county, Dakota Territory,

on the 17th day of August, A. D. 1881, in volume 2 of Deeds, page 315, of which said deed the following is a copy, to wit:

Know all men by these presents that Sophia Weston, of
165 Moody county and Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate lying and being in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen, town. one hundred and six (106), range forty-nine (49):

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Sophia Weston, party of the first part, for her heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
166 J. H. ENO,
JOSEPH GARSON,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

Be it remembered that on this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, appeared Sophia Weston, to me personally known to be the identical person who is described in the foregoing deed as grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereto affixed the day and date last above written.

J. H. ENO,
[SEAL.] *Notary Public.*

(IV.)

That the defendant Alfred Brown entered into actual possession of the said north half of the northeast quarter of section thirteen

(13), township one hundred and six (106), of range forty-nine (49), on or about the 15th day of August, A. D. 1881, claiming it in his own right and title thereto under said deed mentioned in finding No. 3 aforesaid; occupied, used, and cultivated said land, using and claiming the same in his own right from said date to the present time adversely to all the world, and especially as against the said plaintiffs.

(V.)

That the said Thomas K. West and Sophia West, on the 17th day of June, A. D. 1885, and for a long time prior thereto, to wit, on or about the 15th day of August, A. D. 1881, and at the time of the delivery of the said deed to the said Thayer, mentioned in
167 the amended complaint herein, was not in actual possession or otherwise of the said real property mentioned in the 3rd finding of fact herein or any part thereof.

(VI.)

That the said C. E. Thayer *or* Caddie Thayer, his wife, the grantors or predecessors of said plaintiffs, *was* not, on the 19th day of June, A. D. 1885, or at any other time prior to or since said date and at the time of the delivery of said deed to the said plaintiffs, mentioned in the amended complaint herein, in the actual possession of the real property mentioned and described in the 3rd finding of fact or any part thereof.

(VII.)

That neither one of the plaintiffs mentioned in the complaint has been in the possession of any part of said premises mentioned and described in the 3rd finding of fact herein.

(IX.)

That Thomas K. West was a Sioux Indian who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of such abandonment by taking an oath of allegiance to the United States Government and who was entitled under sections 15 and 16 of chapter 131 of the Laws of the United States, passed March 3rd, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30th, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States and had entered said land under said laws and duly proved up on the same and received the patent referred to in finding I of said land.

168 (X.)

That Sophia Weston's real name was Sophia West, and she was the wife of Thomas K. West, the patentee in the patent before referred to.

(XI.)

That on the 19th day of June, 1885, C. E. Thayer and his wife made, executed, and delivered to the plaintiffs in this action a deed for the premises in said patent.

(XII.)

That all of the deeds to Alfred Brown, Sophia West, and Timothy Young were made within 5 years from the date of the patent to Thomas K. West by the United States.

(XIII.)

That the adverse possession of Alfred Brown and Timothy Young is entirely founded on conveyances that are absolutely null and void.

(XIV.)

That the possession *of* Alfred Brown and Timothy Young of said premises and the improvements made by them were made with full notice that Thomas K. West was an Indian, as described in finding IX.

And the court makes the following conclusions of law:

I. That the land described in said patent was absolutely inalienable prior to the 16th day of June, 1885; that the deeds from Thomas K. West to Timothy Young of January 15th, 1881, June 15th, 1885, and from Thomas K. West to Sophia West of August 15th, 1881, and from Sophia West to Alfred Brown of August 15th, 1881, are null and void.

II. That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from
169 C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell are good and valid conveyances and conveyed the title of said property to the said plaintiffs.

III That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises. Let judgment be entered accordingly.

By the court:

C. S. PALMER, *Judge.*

Filed Jan. 27, 1887.

JAMES WILSON,
Clerk of the District Court, Moody County, Dakota.

170 And thereupon said defendant Brown at the proper time duly entered the following exceptions to said findings of fact and conclusions of law:

171 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

And now comes the defendant Alfred Brown at the proper *prime* — for himself and severally excepts to each of the findings of fact found by the court herein and to each and every part of the same; and the said defendant, Alfred Brown, specifically excepts thereto as follows:

I. To the ninth finding of fact and to each and every part thereof, for the reason that the said U. S. patent is absolute on its face and conveys the fee-simple title to the said Thomas K. West, the patentee therein named, without any conditions or restrictions whatever, and the fact as to whether said West was an Indian or had abandoned his tribal relations, or had made declaration and proof as in said finding stated, could not be introduced in evidence or found by the court to affect the title of the grantee of the said West, to wit, the said defendant Brown in this action.

II. To the eleventh finding of fact and to each and every part thereof, for the reason that said West, prior to the execution of said alleged deed to Thayer, had parted with the whole of his title to said land and did not own or possess the same or any part thereof, and that all of said property described in said deed to Thayer and in said patent which is claimed by said Brown in his answer was then held adversely to the said Thayer and to the plaintiffs in this action by the said defendant Brown.

172 III. To the twelfth finding of fact and to each and every part thereof, for the reason that said deed made by the said West to the said defendant Brown was not within five years from the date of said patent and was not within any limitation of the said statute of the United States, and for the reason said patent is absolute and said Brown became the sole owner of said land claimed by him by the said deed to him without any limitation of five years or otherwise.

IV. To the thirteenth finding of fact and each and every part thereof, for the reason that said finding is a conclusion of law and is contrary to law and the evidence in the case, and that said deed to the said defendant Brown *were* legal and valid.

V. To the fourteenth finding of fact and to each and every part thereof, for the reason that said deed to said Brown was legal and valid, and that if notice that said West was an Indian is material such fact was not alleged in plaintiff's amended complaint.

VI. And the said defendant Brown severally excepts to each of said conclusions of law and to each and every part of said conclusions.

VII. And the said defendant Brown further specifically excepts

to the first conclusion of law, for the reason that said land was alienable to June 16, 1885, and that said deed to this defendant Brown was legal and valid.

VIII. To the second conclusion of law and to each and every part thereof, for the reason that said deed- of West & wife to Thayer and from Thayer and wife to the plaintiffs were invalid and illegal, because said West had theretofore parted with the whole of his title to said land, and that said deeds were void because said land
173 was held adversely by this defendant against said Thayer and the said plaintiffs.

IX. To the third conclusion of law and to each and every part thereof, for the same reasons stated in the exception to the second conclusion of law and for the reason that said conclusion is not sustained by the evidence or by the said findings of fact, because the evidence shows from said patent and from said deeds of West and wife to the defendant Brown that said Brown is the sole owner of said premises described in said patent, and that said West had no title thereto at the time he made the said deed to Thayer, and that said property claimed by this defendant was held adversely by this defendant, as stated in the exception to the said second conclusion of law.

Feb. 16, 1887.

GAMBLE BROTHERS,
Attorneys for Defendant Brown.

174 And the court, for sufficient cause, having duly extended the time to both of said defendants to make and serve a notice of intention to move for a new trial in this cause and to make and serve their motions for a new trial herein until the first day of October, 1887, the said defendant, Timothy Young, within the proper time allowed by the court, to wit, on the 7th day of September, 1887, duly served on plaintiffs' counsel the following notice of intention to move for a new trial:

TERRITORY OF DAKOTA, } *ss:*
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, attorney for plaintiffs:

Take notice that the defendant Timothy Young intends to move the court to vacate and set aside the findings and decision of the court rendered in the above cause and to grant a new trial in said cause upon the following grounds:

I. For insufficiency of evidence to justify the findings of the court in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitations or restrictions of the power of alienation or otherwise; that said West, previous to his having made the said deed to Thayer, had conveyed all his title to said property described in the patent to the defendant Young, first, to the forty acres described in Exhibit
175 E, and, second, to the whole land described in said patent as shown in Exhibit F, and said West had no title in said land to convey to Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs and these plaintiffs took no title by or from Thayer, because five years had expired from the date of said patent when said deed, dated June 15, 1885, by said West and wife, was made and delivered to this defendant Young.

Because the findings in favor of said plaintiffs and against this defendant are contrary to the evidence for the reasons above stated and because said 40 acres of land described in Exhibit E was at the time of the delivery of said deed by West and wife to Thayer and by Thayer and wife to these plaintiffs in the actual possession of this defendant, claiming under his said title adverse to each and all of said parties, and because the whole of said land described in the patent was so in the actual possession of said Young, claiming under his said title adverse to all of said parties.

II. Because said findings and decision and each of them are against law, because said conclusions of law are, each of them, contrary to law and the facts as found by said judge.

III. Errors at law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against said defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from West and wife to said Thayer, marked "Exhibit C," against this defendant's objections; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting in evidence the deed from
176 Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court the defendant at the proper time duly excepted.

The court erred in admitting in evidence that West was an Indian and as to his nationality, against this defendant's objection; to which ruling this defendant duly excepted.

The court erred in refusing to find the third, fifth, seventh, and eighth findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making and find- the first, second, third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 3, 5, 7, 8, 9, 11, 12, 13, and 14 findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and

in directing judgment for these plaintiffs, and in finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact, and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

GAMBLE BROTHERS & J. H. ENO,
Att'ys for Def't Young.

177 And the said defendant, Alfred Brown, within the time allowed by the court as aforesaid and within the proper time, to wit, on the 7th day of September, 1887, duly served on plaintiffs' counsel the following notice of intention to move for a new trial:

TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, attorney for plaintiffs:

Take notice that the defendant Alfred Brown intends to move the court to vacate and set aside the findings of fact and decision of the court rendered in the above cause and to grant a new trial in said cause upon the following grounds;

I. For insufficiency of the evidence to justify the findings of the court in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him, without any limitations or restrictions of the power of alienation or otherwise.

That said West and his wife, Sophia West, previous to their having made the said deed to the said Thayer, had conveyed all the title to a part of the property described in the said patent to this defendant, Alfred Brown, described as follows, to wit: The north half of the northeast quarter of section 13, in township 106, of range 49, in said Moody county, Dakota Territory, by prior deeds
178 duly executed by the said Thomas K. West to his wife, Sophia West, and by the said Sophia West to this defendant, as shown by Exhibit G and H, and the said Thomas K. West or Sophia West had no title in said land to convey to the said Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and the said plaintiffs took no title by or from said Thayer.

Because the findings in favor of said plaintiffs and against said

defendant are contrary to the evidence for the reasons above stated, and because the said 80 acres of land above described and shown in Exhibit- G and H at the time of the delivery of said deed by West and wife to said Thayer and by Thayer and wife to these plaintiffs was in the actual possession of this defendant, claiming under his said title by the said deed from the said Sophia West of date August 15, A. D. 1881, adverse to each and all of said plaintiffs.

II. Because said findings and decisions and each of them are against law, because said conclusions of law are, and each of them, contrary to the law and the facts found by said judge.

III. Errors at law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the deed from the said Thomas K. West and his wife to the said Thayer, marked "Exhibit C," against this defendant's objections; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting in evidence that said West was an Indian and as to his nationality, against this defendant's objection; to which ruling the defendant duly excepted.

179 The court erred in refusing to find the fourth and seventh findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 4th, 7th, 9th, 10th, 11th, 12th, 13th, and 14th findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact, and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c.,

J. H. ENO & GAMBLE BROTHERS,
Attorneys for Defendant Brown.

180 And the court having duly extended the time to both defendants to move for a new trial as aforesaid until the first day of October, 1887, the said defendant, Timothy Young, within the proper time and within the time allowed by the court and after the service

of said notice of intention to move for a new trial, to wit, on the 7th day of September, 1887, duly served on plaintiffs' counsel the following motion for a new trial:

181 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

To C. H. Winsor, attorney for plaintiffs:

Please take notice that the defendant Timothy Young will move the court on the 16th day of September, 1887, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, before the Honorable C. S. Palmer, presiding judge, at the court-house, at the city of Elk Point, in the county of Union, in said district and Territory, to set aside the findings and decision of the court rendered in the above-entitled cause and to grant a new trial in said cause upon the following grounds, to wit:

I. For insufficiency of evidence to justify the findings of the court, in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him, without any limitations or restriction of the power of alienation or otherwise; that said West, previous to his having made the said deed to Thayer, had conveyed all his title to said property described in the patent to the defendant Young, first, to the 40 acres described in "Exhibit E," and, second, to the whole land described in said patent, as shown in "Exhibit F;" and said West had no title in said land to convey to Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and these plaintiffs took no title by or from Thayer, because five years had expired from the date of said
182 patent when said deed dated June 15, 1885, by said West and wife was made and delivered to this defendant Young.

Because the findings in favor of said plaintiffs and against this defendant are contrary to the evidence for the reasons above stated, and because said 40 acres of land described in Exhibit E was at the time of the delivery of said deed by West and wife to Thayer and by Thayer and wife to these plaintiffs in the actual possession of this defendant, claiming under his said title adverse to each and all of said parties, and because the whole of said land described in the patent was in the actual possession of said Young, claiming under his said title adverse to all of said parties.

II. Because said findings and decision and each of them are contrary to law, because said conclusions of law are each of them contrary to law and the facts as found by said judge.

III. Errors at law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against said defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from West and wife to said Thayer, marked "Exhibit C," against this defendant's objection; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting in evidence that said West was an Indian and as to his nationality, against defendant's objection; to which ruling the defendant duly excepted.

The court erred in admitting in evidence the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this
183 defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in refusing to find the third, fifth, seventh, and eighth findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making and finding the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 3, 5, 7, 8, 9, 11, 12, 13, and 14 finding- of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c., GAMBLE BROTHERS & J. H. ENO,
Att'ys for Defendant Young.

(Endorsed:) District court, Moody county. S. S. Taylor & S. A. Bidwell *vs.* Alfred Brown and Timothy Young *et al.* Motion for new trial—Young. J. H. Eno & Gamble Bros., att'ys for Young, Yankton, D. T. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

184 And afterwards, to wit, on the 16th day of September, 1887, at the time and place mentioned in said motion, the said motion for new trial coming on duly to be heard, and having heard Gamble Brothers for said motion, and C. H. Winson, attorney for the plaintiffs, *contra*—

It is ordered that said motion for a new trial be, and the same is hereby, overruled and denied.

By the court:

C. S. PALMER, *Judge.*

And thereupon said defendant, Timothy Young, then and there duly excepted.

C. S. PALMER, *Judge.*

185 And the court having duly extended the time for making a motion for a new trial herein as aforesaid until the first day of October, 1887, by proper order of the court, said defendant, Alfred Brown, within the proper time, to wit, on the 7th day of September, 1887, duly served the following motion for a new trial herein:

186 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Motion for New Trial.

To C. H. Winsor, attorney for plaintiffs:

Please take notice that the defendant Alfred Brown will move the court on the 16th day of September, 1887, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, before the Honorable C. S. Palmer, presiding judge, at the court-house, at the city of Elk Point, in the county of Union, in said district and Territory, to vacate and set aside the findings and decision of the court rendered in the above-entitled cause and for a new trial upon the following grounds, to wit:

I. For the insufficiency of the evidence to justify the findings of the court, in this:

Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitation or restrictions of the power of alienation or otherwise.

That said West and his wife, Sophia West, previous to their having made the said deed to the said Thayer had conveyed all the title to a part of the property described in the said patent to this defendant, Alfred Brown, described as follows, to wit, the north half of the northeast quarter of section 13, in township 106, of range 49, in said Moody county, Dakota Territory, by prior deeds, duly executed, by the said Thomas K. West to his wife, Sophia West, and by
187 the said Sophia West to this defendant, as shown by Exhibits G and H, and the said Thomas K. West or Sophia West had no title in said land to convey to the said Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and the said plaintiffs took no title by or from said Thayer.

Because the findings in favor of said plaintiffs and against said defendant are contrary to the evidence for the reasons above stated, and because the said 80 acres of land above described and shown in Exhibits G and H at the time of the delivery of said deed by West and wife to these plaintiffs was in the actual possession of this defendant, claiming under his said title by the said deed from the said Sophia West, of date August 15, A. D. 1881, adverse to each and all of said plaintiffs.

II. Because said findings and decision and each of them are against law, because said conclusions of law are and each of them contrary to the law and the facts so found by said judge.

III. Errors of law occurring at the trial and duly excepted to by this defendant.

The court erred in admitting the record of the General Land Office, marked "Exhibit A," against this defendant's objections; to which ruling of the court this defendant at the proper time duly excepted.

The court erred in admitting the deed from the said Thomas K. West and his wife to the said Thayer, marked "Exhibit C," against this defendant's objections; to which ruling this defendant at the proper time duly excepted.

The court erred in admitting the deed from Thayer and wife to these plaintiffs, marked "Exhibit D," against this defendant's objection; to which ruling of the court this defendant at the proper time duly excepted.

188 The court erred in admitting in evidence that West was an Indian and as to his nationality against this defendant's objection; to which ruling this defendant duly excepted.

The court erred in refusing to find the fourth and seventh findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in not making the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

The court erred in making the 4th, 7th, 9th, 10th, 11th, 12th, 13th, and 14th findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs and in finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

Said motion will be made upon the minutes of the court, the findings of fact and conclusions of law requested by this defendant; on the documentary evidence, consisting of the various exhibits introduced in evidence; on the findings of fact and conclusions of law found by the court and exceptions thereto; on the stenographer's report of said testimony, and all other papers and proceedings used upon the trial.

Yours, &c.,

GAMBLE BROTHERS & J. H. ENO,
Att'ys for Defendant Brown.

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Motion for new trial by def't Brown. Gamble Bros, att'ys for def't Brown.

189 And afterwards, to wit, on the 16th day of September, 1887, at the time and place mentioned in said motion, the said motion for a new trial coming on duly to be heard, and having heard Gamble Brothers for said motion and C. H. Winsor, attorney for the plaintiffs, *contra*—

It is ordered that said motion for a new trial be, and the same is hereby, overruled and denied.

By the court:

C. S. PALMER, *Judge.*

And thereupon said defendant, Alfred Brown, then and there duly excepted.

C. S. PALMER, *Judge.*

190 And now, this 21 day of September, 1887, at the proper place and within the proper time allowed by the court, and the court having, prior to judgment herein, duly granted a stay of all proceedings in this action to October 1, 1887, and having, among other things, duly extended the time to prepare and settle the bill of exceptions herein to that date, and a copy of the foregoing bill of exceptions having been duly and personally served on plaintiffs' counsel, and due and proper notice of the settlement of the said foregoing bill of exceptions having been served on said counsel for the plaintiff-, and the plaintiffs appearing by C. H. Winsor, their attorney, and the defendants Young and Brown appearing by Gamble Brothers, their attorneys, the court finds that the foregoing bill of exceptions contains all the evidence introduced on the trial of this cause, and being duly advised in the premises—

It is ordered that said bill of exceptions be, and *they are* hereby, allowed, settled, and signed and made a part of the record and judgment-roll in this cause.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown *et al.* Bill of exceptions. Filed Sep. 23, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

191 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Judgment.

This cause having been regularly called for trial before the court at the regular January term, 1887, for said county, and a trial by jury having been expressly waived in open court by the parties appearing therein, C. H. Winsor, Esq., appeared as attorney for the said plaintiffs and J. H. Eno, Esq., and Messrs. Gamble Brothers appeared as attorneys for the said defendants, Alfred Brown and Timothy Young, the other parties not having been served or appeared herein; and said case coming to trial on the complaint of the plaintiff-, the separate answers of Alfred Brown and Timothy Young, and the reply of the plaintiffs, and the court having heard the proofs of the respective parties and considered the same and the records and papers in the case and the arguments of the respective counsel therein, and having duly considered the same and found the facts and made conclusions of law of said case and decided said matters at issue in favor of the plaintiffs, now, therefore, it is adjudged that the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of the property described in the complaint, to wit: The south half (S. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section twelve (12) and the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section thirteen (13), in township one hundred and six (106), of
192 range forty-nine (49), in Moody county, Dakota Territory, and are entitled to the possession of said premises and have been such owners and entitled to such possession since the 19th day of June, 1885; that the deeds from Thomas K. West to Timothy Young, dated January 15th, 1881, of a portion of said premises, and June 15th, 1885, for the whole of said premises, and from Thomas K. West to Sophia West, of August 15th, 1881, for a portion of said premises, and from Sophia West to Alfred Brown, of August 15th, 1881, for a portion of said premises, are null and void and are hereby ordered cancelled of record, and that the plaintiffs recover of the defendant- Timothy Young and Alfred Brown the sum of forty-one & $\frac{30}{100}$ dollars, costs and disbursements in this action.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) District court, Moody county. S. S. Taylor *et al.* against Alfred Brown *et al.* Judgment. Filed Feb. 23, 1887. James Wilson, clerk. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk. District court, Moody county. S. S. Taylor and S. A. Bidwell *vs.* Alfred Brown, Timothy Young, *et al.* Papers in case. Judgment-roll. Filed Oct. 25, 1887. James

Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk. C. H. Winsor, attorney for pl'ffs, Sioux Falls, D. T.

193 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants.

Whereas the above-named plaintiffs recovered judgment against the defendants Alfred Brown and Timothy Young in the district court of Moody county, D. T., for the possession of certain real property and declaring that the plaintiffs are the owners of said real property and entitled to the possession of the same, and that certain deeds to the defendants Brown and Young be declared null and void and canceled, and also for the recovery from said defendants of the sum of forty-one & $\frac{30}{100}$ ($41.30) dollars, costs, which judgment was filed and entered on the 23rd day of February, 1887, in said court, and the above-named appellant, Alfred Brown, feeling aggrieved, intends to appeal therefrom to the supreme court of the Territory of Dakota.

Now, therefore, we, all residents of Moody county, do hereby undertake, pursuant to statute, that the said appellant shall pay all costs and damages that may be awarded him on such appeal not exceeding the sum of two hundred and fifty ($250.00) dollars, and do also undertake, pursuant to statute, in the further sum of one thousand ($1,000.00) dollars, that during the possession of the said property by the said appellant he will not commit or suffer to be committed any waste thereon, and that if the said judgment be affirmed the said appellant will pay the value of the use and occupation of the said property from the time of the said appeal until the delivery of the possession thereof, pursuant to said judgment, and also under-
194 take that if said judgment or any part thereof be affirmed or said appeal be dismissed the said appellant will pay the amount directed to be paid by said judgment or the part of such amount as to which the said judgment shall be affirmed, if it shall be affirmed only in part, and all damages and costs which shall be awarded against said appellant on such appeal.

Dated at Moody county, D. T., this 28th day of October, 1887.

ALFRED BROWN. [SEAL.]
JOHN E. MOORE. [SEAL.]
RALPH SMITH. [SEAL.]
FERDINAND COLEMAN. [SEAL.]

TERRITORY OF DAKOTA, } ss:
County of Moody, }

John E. Moore, Ferdinand Coleman, and Ralph Smith, being severally duly sworn, each for himself says: The said John E. Moore says he is a resident and freeholder of the county of Moody, in this Territory, and the he is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution. The said Ferdinand Coleman says he is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution. The said Ralph Smith says he is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

JOHN E. MOORE.
RALPH SMITH.
FERDINAND COLEMAN.

Subscribed and sworn to before me, a clerk of district court, this 28th day of October, 1887.

[SEAL.] JAMES WILSON,
Clerk District Court in and for Moody County, Dakota Territory.

195 TERRITORY OF DAKOTA, } ss:
County of Moody, }

On this 28th day of October, 1887, before me, the subscriber, appeared Alfred Brown, John E. Moore, Ferdinand Coleman, and Ralph Smith, to me personally known to be the same persons described in and who executed the within and foregoing undertaking, and severally acknowledged that they executed the same.

JAMES WILSON,
[SEAL.] *Clerk District Court, Moody County, Dakota.*

(Endorsed:) (Original.) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown, Timothy Young, *et al.* Bond of Alfred Brown. Due personal service of thw within undertaking is hereby admitted this 9th of November, A. D. 1887. C. H. Winsor, attorney for plaintiff-. James Wilson, clerk district court. Gamble Bros., attorneys for def't Brown, Yankton, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

196 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs, }
vs. } Notice of Appeal
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } —Alfred Brown.

Please take notice that the defendant Alfred Brown appeals from the judgment entered in the above-entitled action in favor of the plaintiffs and against this defendant and his codefendants Timothy Young, adjudging, among other things, that the plaintiffs are the owners of the real property mentioned in said judgment, and that they are entitled to the possession of the same, and cancelling certain deeds to this defendant, and for costs against said defendants, forty-one $\frac{30}{100}$ ($41.30) dollars, filed and entered February 23, 1887, and from the whole of said judgment against this defendant.

And you are further notified that said defendant Brown also appeals from the order overruling his motion for a new trial in said action.

Dated October 31st, 1887.

Yours, &c.,

GAMBLE BROTHERS & J. H. ENO,
Attorneys for Defendant Brown.

To C. H. Winsor, Esq., attorney for plaintiffs, and James Wilson, clerk dist. court for Moody county.

(Endorsed:) Original. District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown, Timothy Young, *et al.* Notice of appeal of Alfred Brown. Due personal service of the within notice of appeal is hereby admitted this 9th of November, A. D. 1887. C. H.
197 Winsor, attorneys for plaintiffs. James Wilson, clerk dist. c't, Moody Co. Gamble Bros., attorneys for def't Brown, Yankton, Dakota. Filed at 4 o'clock p. m. on Nov. 9, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

198 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs, }
vs. }
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. }

Whereas the above-named plaintiffs recovered judgment against the defendants Alfred Brown and Timothy Young, in the district

court of Moody county, D. T., for the possession of certain real property, and declaring that the plaintiffs are the owners of said real property and entitled to the possession of the same, and that certain deeds to the defendants Brown and Young be declared null and void and cancelled, and also for the recovery from said defendants of the sum of forty-one & $\frac{30}{100}$ ($41.30) dollars costs, which judgment was filed and entered on the 23rd day of February, 1887, in said court, and the above-named appellant, Timothy Young, feeling aggrieved, intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we, all of Moody county, do hereby undertake, pursuant to statute, that the said appellant shall pay all costs and damages that may be awarded against him on such appeal not exceeding the sum of two hundred and fifty ($250.00) dollars, and do also undertake, pursuant to statute, in the further sum of one thousand ($1,000.00) dollars, that during the possession of the said property by the said appellant he will not commit or suffer to be committed any waste thereon, and that if the said judgment be affirmed the said appellant will pay the value of the use and occupation of the said property from the time of the said appeal until the delivery of the possession thereof pursuant to said judg-
199 ment; and also undertake that if said judgment or any part thereof be affirmed or said appeal be dismissed the said appellant will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on such appeal.

Dated at Moody county, D. T., this 31st day of October, 1887.

TIMOTHY YOUNG. [SEAL.]
BENEDICT MILLER. [SEAL.]
JOHN SMITH. [SEAL.]

TERRITORY OF DAKOTA, } ss:
County of Moody, }

Benedict Miller and John Smith, being severally duly sworn, each for himself says: The said Benedict Miller says he is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of thirteen hundred ($1,300.00) dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

The said John Smith says he is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of thirteen hundred ($1,300.00) dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

BENEDICT MILLER. [SEAL.]
JOHN SMITH. [SEAL.]

Subscribed and sworn to before me this 31st day of October, 1887.

GEORGE M. SMITH,
[NOTARIAL SEAL.] *Notary Public, D. T.*

200 TERRITORY OF DAKOTA, } ss:
County of Moody, }

On this 31st day of October, 1887, before me, the subscriber, appeared Timothy Young, Benedict Miller, and John Smith, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

[SEAL.] GEORGE M. SMITH,
Notary Public, D. T.

(Endorsed:) (Original.) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown, Timothy Young, *et al.* Bond of Timothy Young. Due personal service of the within undertaking is hereby admitted this 9th of November, A. D. 1887. C. H. Winsor, attorney for plaintiffs. James Wilson, cl'k dist. court. Gamble Bros., attorneys for def't Young, Yankton, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

201 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Moody County.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARROW, and JAMES SMITH, Defendants. } Notice of Appeal.

Please take notice that the defendant Timothy Young appeals from the judgment entered in the above-entitled action in favor of the plaintiffs and against this defendant and his codefendant, Alfred Brown, adjusging, among other things, that the plaintiffs are the owners of the real property mentioned in said judgment, and that they are entitled to the possession of the same, and canceling certain deeds to this defendant, and for costs against said defendants for forty-one & $\frac{30}{100}$ ($41.30) dollars, filed and entered February 23, 1887, and from the whole of said judgment against this defendant.

And you are further notified that said defendant Young also appeals from the order overruling his motion for a new trial in said action.

Dated October 31st, 1887.

Yours, &c.,

GAMBLE BROTHERS & J. H. ENO,
Attorneys for Defendant Young.

To C. H. Winsor, Esq., attorney for plaintiffs, and James Wilson, clerk of dist. court for Moody county.

(Endorsed:) (Original.) District court, Moody county. S. S. Taylor *et al. vs.* Alfred Brown, Timothy Young, *et al.* Notice of appeal of Timothy Young. Due personal service of the within notice of appeal is hereby admitted this 9th of November, A. D. 1887.

C. H. Winsor, attorney for plaintiffs. James Wilson, clerk of the district court, Moody county. Gamble Bros., attorneys for def't Young, Yankton, Dakota. Filed at 4 o'clock p. m. on Nov. 9, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

202 TERRITORY OF DAKOTA, } ss:
County of Moody, Fourth Judicial District, }

I, James Wilson, clerk of the court within and for the said county of Moody, in the fourth judicial district of the Territory of Dakota, do hereby certify and return that the above and foregoing is the original notices of appeal and undertakings given thereon, and proof of service of said notices of appeal and undertakings, and the original judgment-roll and the whole of the same and all the original papers contained there in said judgment-roll, viz., the summons, complaint, amended complaint, answer of the defendant Young, answer of the defendant Brown, replies of plaintiffs to the counter-claims of the defendants Young and Brown, requests of the defendant Young to the court to make findings of fact and conclusions of law in his favor, and exceptions of said defendant Young to refusals to find as requested by him; the findings of fact and conclusions of law of the court against Young, and exceptions of said Young thereto; the request of the defendant Brown to make findings of fact and conclusions of law in his favor, and exceptions to refusals to so find; the findings of fact and conclusions of law by the court against Brown, and his exceptions thereto; the seven orders extending time to settle bills of exceptions, &c.; order fixing the amount of undertakings, the notices of intention to move for new trials by Brown and Young; the motions for a new trial by Brown and Young, and orders overruling same; the bill of exceptions and final judgment wherein S. S. Taylor and S. A. Bidwell are plaintiffs and Alfred Brown,
203 Timothy Young, Samuel Darrow, and James Smith are defendants, and they are transmitted to the Supreme Court pursuant to such appeals taken herein.

Witness whereof I hereunto set my hand and the seal of said county this 21st day of January, 1888.

JAMES WILSON,
[SEAL.] *Clerk of the District Court, Moody County.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 1, 1888. J. H. C. Young, clerk.

204 TERRITORY OF DAKOTA :

In Supreme Court.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN, TIMOTHY YOUNG, *et al.*, Defendants and Appellants.

Assignments of Errors by Brown.

I.

The court erred in admitting in evidence the record from the General Land Office, marked "Exhibit A," against defendant's objection.

II.

The court erred in admitting in evidence that said West was an Indian and as to his nationality against defendant's objection.

III.

The court erred in refusing to find the fourth and seventh findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

IV.

The court erred in not making the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

V.

The court erred in making the 4th, 7th, 9th, 10th, 11th, 12th, 13th, and 14th findings of fact against these defendants; to each of which findings this defendant at the proper time duly excepted.

205 VI.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs.

VII.

The court erred in making and finding the first, second, and third conclusions of law; to each of which decisions and conclusions the defendant at the proper time duly excepted.

VIII.

The court erred in overruling defendant Brown's motion for a new trial for the errors heretofore assigned and for the following grounds:

For insufficiency of the evidence to justify the findings of the court in this:

1. Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitations or restrictions of the power of alienation or otherwise.

That said West and his wife, Sophia West, previous to their having made the said deed to the said Thayer, had conveyed all the title to a part of the property described in the said patent to this defendant, Alfred Brown, described as follows, to wit: the north half of the northeast quarter of section 13, in township 106, of range 49, in said Moody county, Dakota Territory, by prior deeds duly executed by the said Thomas K. West to his wife, Sophia West, and by the said Sophia West to this defendant, as shown by Exhibits G and H, and the said Thomas K. West and Sophia West had no title in said land to convey to the said Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs, and the said plaintiffs took no title by or from said Thayer.

206 IX.

2. Because the findings in favor of said plaintiffs and against said defendant are contrary to the evidence for the reasons above stated.

X.

3. Because the said 80 acres of land above described and shown in "Exhibits G and H" at the time of the delivery of said deed by West and wife to said Thayer and by Thayer and wife to these plaintiffs was in the actual possession of this defendant, claiming under his said title by the said deed from the said Sophia West of date August 15, A. D. 1881, adverse to each and all of said plaintiffs.

XI.

Because said findings and decision and each of them are against law, because said conclusions of law are, and each of them, contrary to law and the facts found by the court.

XII.

The plaintiffs are not entitled to judgment upon the findings of fact in their favor, for the reason that the findings do not show title in the plaintiffs, in this: It is not found that the title from West, the patentee, ever passed to Thayer, the grantor of plaintiffs.

XIII.

Because the plaintiffs are not entitled to judgment on the pleadings and the facts found by the court, in this: If it is material to enable the plaintiffs to recover in the action for the reason that West is an Indian, it is also material to allege that the defendants had notice of the fact, and the omission of such allegation is fatal to the plaintiffs' right to recover in the action.

207 XIV.

The defendant Brown is entitled to a dismissal of the plaintiffs' cause of action against him on the pleadings and the facts found by the court, for the reason that it appears upon the face of the pleadings that the action is brought by the plaintiffs to remove a cloud from their title to the real property in question, and the findings of the court are that the defendants are in possession and the plaintiffs out of possession of said real property.

J. H. ENO & GAMBLE BROTHERS,
Attorneys for Appellant, Alfred Brown.

(Endorsed:) 384. Territory of Dakota. In the supreme court. S. S. Taylor and S. A. Bidwell, pl'ffs & respondents, *vs.* Alfred Brown, Timothy Young, *et al.*, def'ts & appellants. Assignment of errors — Brown. Gamble Bros., attorneys for appellant Brown, Yankton, Dakota. Filed Feb'y 2, 1888. J. H. C. Young, clerk.

208 TERRITORY OF DAKOTA:

In Supreme Court.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN, TIMOTHY YOUNG, *et al.*, Defendants and Appellants.

Assignment of Errors by Young.

I.

The court erred in admitting in evidence the record from the General Land Office, marked "Exhibit A," against defendant's objections.

II.

The court erred in admitting in evidence that said West was an Indian and as to his nationality against defendant's objection.

III.

The court erred in refusing to find the third, seventh, and eighth findings of fact duly requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

IV.

The court erred in not making and finding the first, second, and third conclusions of law requested by this defendant; to each of which refusals this defendant at the proper time duly excepted.

V.

The court erred in making the 3, 5, 7, 8, 9, 11, 12, 13, and
209 14 findings of fact against this defendant; to each of which findings this defendant at the proper — duly excepted.

VI.

The court erred in not directing judgment for this defendant and in directing judgment for these plaintiffs.

VII.

The court erred in making and finding the first, second, and third conclusions of law; to each of which decisions and conclusions defendant at the proper time duly excepted.

VIII.

The court erred in overruling this defendant's motion for a new trial for the errors hereinbefore assigned and for the following grounds:

For insufficiency of the evidence to justify the findings of the court, in this:

1. Because the United States patent to Thomas K. West is absolute on its face and conveyed a fee-simple title to him without any limitations or restrictions of the power of alienation or otherwise; that said West, previous to his having made the said deed to Thayer, had conveyed all his title to said property described in the patent to the defendants Young, first, to the forty acres described in "Exhibit B," and, second, to the whole land described in said patent as shown in "Exhibit F," and said West had no title in said land to convey to Thayer June 17, 1885, and said Thayer conveyed nothing to these plaintiffs and these plaintiffs took no title by or from Thayer.

IX.

2. Because five years had elapsed from the date of said patent when said deed, dated June 15, 1885, by said West and wife was made and delivered to this defendant Young.

210 X.

3. Because the findings in favor of said plaintiffs and against this defendant are contrary to the evidence for the reasons above stated.

XI.

4. Because said 40 acres of land described in "Exhibit E" was at the time of the delivery of said deed by West and wife to Thayer and by Thayer and wife to these plaintiffs in the actual possession of this defendant, claiming under his said title adverse to each and all of said parties.

XII.

5. Because the whole of said land described in the patent was so in the actual possession of said Young, claiming under his said title adverse to all said parties.

XIII.

Because said findings and decisions and each of them are against

law, because said conclusions of law are each of them contrary to the law and the facts as found by this court.

XIV.

The plaintiffs are not entitled to judgment upon the findings of fact in their favor, for the reason that the findings do not show title in the plaintiffs, in this: It is not found that the title from West, the patentee, ever passed to Thayer, the grantor of plaintiffs.

XV.

Because the plaintiffs are not entitled to judgment on the pleadings under the facts found by the court, in this: It is *is* material to enable the plaintiffs to recover in the action for the reason that West is an Indian; it is also material to allege that the defendants had notice of that fact, and the omission of such allegation is fatal
211 to the plaintiffs' right to recover in the action.

XVI.

The defendant Young is entitled to a dismissal of plaintiffs' cause of action against him on the pleadings and the facts found by the court, for the reason that it appears upon the face of the pleadings that the action is brought by the plaintiffs to remove a cloud from their title to the real property in question, and the findings of the court are that the defendants are in possession and the plaintiffs out of possession of said real property.

J. H. ENO AND GAMBLE BROTHERS,
Attorneys for Appellant Timothy Young.

(Endorsed:) 384. Territory of Dakota. In the supreme court. S. S. Taylor and S. A. Bidwell, pl'ffs & respondents, *vs.* Alfred Brown, Timothy Young, *et al.*, def'ts & appellants. Assignment of errors—Young. Gamble Bros., attorneys for appellant Young, Yankton, Dakota. Filed Feb'y 2, 1888. J. H. C. Young, clerk.

212 Exhibits used in the trial of the case S. S. Taylor *et al. vs.* Alfred Brown & Timothy Young forwarded by James Wilson, clerk of the district court of Moody county, to clerk of supreme court at Bismarck, Dakota.

213 EX. "B."

THE UNITED STATES OF AMERICA:

Homestead certificate No. 2995; application 4788.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux Falls, Dakota Territory, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental

thereto, the claim of Thomas K. West has been established and duly consummated, in conformity to law, for the south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, in township one hundred and six, of range forty-nine, in the district of lands subject to sale at Sioux Falls, Dakota Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Thomas K. West the tract of land above described:

To have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas K. West and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor
214 of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

[SEAL.]

R. B. HAYES,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 7, page 193.

(Endorsed:) Office of the register of deeds, county of Moody, Dakota, *ss:* I hereby certify that the within instrument was filed in this office for record on the 7th day of Oct., A. D. 1881, at 9 o'clock a. m., and was duly recorded in Book 3 of Deed-, page- 134 & 135. Hans Olson, register of deeds. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

215 37347. B. DEPARTMENT OF THE INTERIOR, S. N. E.
GENERAL LAND OFFICE, M. C.
WASHINGTON, D. C., *May* 24, 1886.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copies of all the papers relative to the homestead entry of Thomas K. West at Sioux Falls, Dakota Territory, application No. 4788, final certificate No. 2995, are true and literal exemplifications of the original papers on file in this office.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] WM. A. J. SPARKS,
Commissioner of General Land Office.

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

216 Final receiver's receipt No. 2995; application No. 4788.

Homestead.

RECEIVER'S OFFICE,
SIOUX FALLS, D. T., *August* 26, 1879.

Received of Thomas K. West the sum of four dollars — cents, being the balance of payment required by law for the entry of the S. ½ S. E. ¼, sec. 12, and N. ½ N. E. ¼ of section 13, in township 106, of range 49, containing 160 acres, under section 2291 of the Revised Statutes of the United States.

4.00. J. M. WASHBURN, *Receiver.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

217 Homestead.

Final certificate No. 2995; application No. 4788.

LAND OFFICE AT SIOUX FALLS, D. T.,
August 26th, 1879.

It is hereby certified that, pursuant to the provisions of section No. 2291, Revised Statutes of the United States, Thomas K. West has made payment in full for the south ½ S. E. ¼ sec. 12 and north ½ N. E. ¼ of section No. thirteen (13), in township No. one hundred & six (106), of range No. forty-nine (49), of the 160 principal meridian, containing — acres.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Thomas K. West shall be entitled to a patent for the tract of land above described.

B. F. CAMPBELL, *Register.*

(Endorsed:) Final certificate No. 2995. Homestead application No. 4788. Thomas K. West. Land office at Sioux Falls, D. T., August 26, 1879. Sect. 13, town. 106, range 49. Approved. B. F. Campbell, reg. J. M. Washburn, rec. Patented June 15th, 1880. Recorded vol. 7, page 193. Approved. C. T. Y. O. K. Ex. Apr. 8, '80. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

218 Receiver's receipt No. 4788; application No. 4788.

Homestead.

RECEIVER'S OFFICE,
SIOUX FALLS, D. T., *June* 18, 1873.

Received of Thomas K. West the sum of fourteen dollars — cents, being the amount of fee and compensation of register and receiver for the entry of S. ½ S. E. ¼ sec. 12 and N. ½ N. E. ¼ of section 13, in township 106, of range 49, under the acts of Congress approved May 20, 1862, and March 21, 1864, entitled "An act to secure homesteads to actual settlers on the public domain."

$14.00. J. M. WASHBURN, *Receiver.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

219 Duplicate receiver's receipt No. 4788; application No. 4788.

Homestead.

RECEIVER'S OFFICE,
SIOUX FALLS, D. T., *June* 18, 1873.

Received of Thomas K. West the sum of fourteen dollars — cents, being the amount of fee and compensation of register and receiver for the entry of S. ½ S. E. ¼ sec. 12 & N. ½ N. E. ¼ of section 13, in township 106, of range 49, under the acts of Congress approved May 20, 1862, and March 21, 1864, entitled "An act to secure homesteads to actual settlers on the public domain."

$14.00. J. M. WASHBURN, *Receiver.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

220 Indian homestead.

Application No. 4788.

LAND OFFICE AT SIOUX FALLS, D. T., *June 18th*, 1873.

I, Thomas K. West, of Moody Co., D. T., do hereby apply to enter under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," the S. ½ S. E. ¼ sec. 12 and N. ½ N. E. ¼ of section 13, in township 106, of range 49, containing 160 acres.

THOMAS K. WEST.

LAND OFFICE AT SIOUX FALLS, D. T., *June* 18, 1873.

I, B. F. Campbell, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and that there is no prior, valid, adverse right to the same.

B. F. CAMPBELL, *Register.*

(Endorsed:) No. 4788. Homestead application. Thomas K. West, Sioux Falls, D. T., June 18, 1873, sec. 12, 13, town. 106, range 49. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

6.65.

221 Indian homestead.

(Affidavit.)

LAND OFFICE AT SIOUX FALLS, D. T., *June* 18, 1873.

I, Thomas K. West, of Moody county, D. T., having filed my application No. 4788 for an entry under the provisions of the act of Congress, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear that I am the head of a family consisting of a wife and children and a citizen of the United States; that said application No. 4788 is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever, *ei*ther have I heretofore perfected or abandoned an entry made under this act.

THOMAS K. WEST.

Sworn to and subscribed this 18th day of June, 1873, before—
B. F. CAMPBELL,
Reg. of the Land Office.

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

222 *Affidavit.*

Indian homestead No. 4788.

I, Thos. K. West, formerly of the Santee Sioux tribe of Indians, do solemnly swear that I have voluntarily dissolved all connections with that tribe, and that it is *bona fide* my intention to forego all claim to or share in any of its annuities or benefits and in good faith to perform the duties of a citizen of the United States.

THOMAS K. WEST.

Sworn and subscribed to before me this 18th day of June, 1873.
B. F. CAMPBELL, *Register.*

Affidavit in Support of Indian Homestead or Pre-emption.

— do solemnly swear that, to the best of our knowledge and belief, Thos. K. West, formerly of the Santee Sioux tribe of Indians, has dissolved all connections with said tribe and does not claim or share any of the annuities or benefits inuring to said tribe of Indians by

treaty or otherwise, but is performing all such duties as pertain to a citizen of the United States.

DAVID FARIBAULT.
JOSEPH P. HELLERS.

Sworn and subscribed to before me this 18th day of June, 1873.
B. F. CAMPBELL, *Register.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

223 *Homestead Proof.*

Final affidavit required of homestead claimants, section 2291 of the Revised Statutes of the United States.

I, Thomas K. West, having made a homestead entry of the S. ½ S. E. ¼, sec. 12, & N. ½ N. E. ¼ section No. 13, in township No. 106, of range No. 49, subject to entry at Sioux Falls, D. T., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim by virtue of section No. 2291 of the Revised Statutes of the United States, and for that purpose do solemnly — that I am an Indian of the Santee Sioux tribe & was born in the United States; that I have made actual settlement upon and have cultivated said land, having resided thereon since the 18th day of June, 1873, to the present time; that no part of said land has been alienated except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States, and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

THOMAS K. WEST.

I, J. M. Washburn, receiver of the land office at Sioux Falls, D. T., do hereby certify that the above affidavit was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN.

(Endorsed:) Final homestead affidavit under section 2291, R. S. Application No. 4788. Final certificate No. 2995. Land office at Sioux Falls, D. T., Aug. 26th, 1876. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

224 *Affidavit of Publication.*

TERRITORY OF DAKOTA, } ss:
Moody Co., }

I, Geo. R. Lanning, on oath depose and say I am the publisher of the Roscoe Express, a weekly newspaper published at Roscoe, Moody Co., D. T.; that the annexed proof notice was published in said newspaper for five consecutive weeks, and that said notice was

first published in the issue of July 17, 1879, and last in the issue of Aug. 14, 1879.

GEO. R. LANNING.

Subscribed and sworn to before me this 15th day of August, 1879.
[L. S.] J. H. ENO,
Notary Public in and for Dakota Territory.

UNITED STATES LAND OFFICE,
SIOUX FALLS, D. T., *August* 26, 1879.

I, B. F. Campbell, register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, as required by the act of March 3, 1879, I having first posted said notice on the 16th day of July, 1879.

B. F. CAMPBELL, *Register.*

225 LAND OFFICE AT SIOUX FALLS, D. T., *July 16th*, 1879.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim and secure final entry thereof at the expiration of thirty days from the date of this notice, viz., Thomas K. West, under his homestead filing No. 4788 for the south half of the southeast quarter of section 12 and the north half of the northeast quarter of section 13, township 106, range 49, and names the following as his witnesses, viz., Charles Henry and John C. Redwing, of Roscoe, D. T.

B. F. CAMPBELL, *Register.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

226 *Homestead Proof—Testimony of Claimant.*

THOMAS K. WEST, being called as a witness in his own behalf in support for his homestead entry for S. ½ S. E. ¼ sec. 12 & N. ½ N. E. ¼ sec. 13, t'p 106, R. 49, testifies as follows:

Quest. 1. What is your name? (Be careful to give it in full, correctly spelled, in order that it may be here written exactly as you wish it written in the patent which you desire to obtain.)

Ans. Thomas K. West.

Ques. 2. What is your age?

Ans. 38 years.

Ques. 3. Are you the head of a family or a single person; and, if the head of a family, of whom does your family consist?

Ans. Head of family, consisting of wife and four children.

Ques. 4. Are you a native-born citizen of the United States? If not, have you declared your intention to become a citizen and have you obtained a certificate of naturalization?

Ans. I am Santee Sioux Indian, formerly of the Sioux tribe; born in the U. S.

Ques. 5. Are there any indications of coal, salines, or minerals of any kind on the land embraced in your homestead entry aboce described? (If so, state what they are and whether the springs or mineral deposits are valuable.)

Ans. No.

Ques. 6. Is the land more valuable for agricultural than mineral purposes?

Ans. It is.

Ques. 7. What is your post-office address?

Ans. Roscoe, D. T.

227 Ques. 8. Have you ever made a homestead entry except for this land, No. 4788? (If you have, give, as nearly as you can, the date thereof and description of the land, and state whether the entry still subsists, or, if it has been canceled, state the cause of its cancellation.

Ans. No.

Ques. 9. Have you sold the land or conveyed to any one your right and interest in the same; and, if so, to whom and for what purpose?

Ans. No.

Ques. 10. Does any one except yourself claim the land under the homestead or pre-emption laws?

Ans. No.

Ques. 11. When did you first make settlement on the said land?

Ans. June 18th, 1873.

Ques. 12. When did you first establish a residence upon the land?

Ans. June 18th, 1873.

Ques. 13. At the date you have given as being the date that you first established your residence upon the land did you move thereon in person?

Ans. I did.

Ques. 14. Up to what time have you resided on the land?

Ans. To present time.

Ques. 15. Was your residence upon the land continuous during the period named?

Ans. It was.

Ques. 16. If you had a family during said period of residence on the homestead did your family reside thereon?

Ans. They did.

Ques. 17. What improvements have you made or do you
228 possess on the land? (Describe them.)

Ans. House 14 x 16 ft., stable, & 20 acres broken.

Ques. 18. When was your house built?

Ans. June 18th, 1873.

Ques. 19. What is the total value of said improvements?

Ans. One hundred & fifty dollars.

Ques. 20. For what purpose have you used the land?

Ans. Farming.

Ques. 21. How much of the land have you broken and cultivated, and what crops, if any, have you raised?

Ans. Twenty acres; wheat, oats, & corn raised on same.

THOMAS K. WEST.

I hereby certify that each question and answer in the foregoing testimony was read to the claimant before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

(Endorsed:) Homestead proof. Testimony of claimant. Land office at Sioux Falls, D. T. Original application No. 4788. Final certificate No. 2995. Cash No. —. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

229 *Homestead Proof—Testimony of Witness.*

CHARLES HENRY, being called as a witness in support of the homestead entry of Thomas K. West for S. ½ S. E. ¼ sec. 12 & N. ½ N. E. ¼ sec. 13, t'p 106, R. 49, testifies as follows:

Ques. 1. What is your post-office address?

Ans. Roscoe, D. T.

Ques. 2. What is your occupation?

Ans. Farming.

Ques. 3. Are you well acquainted with Thomas K. West, the claimant, in this case, and how long have you known him?

Ans. Known him over six years.

Ques. 4. How old do you know or believe claimant to be?

Ans. 38 years.

Ques. 5. Is claimant the head of a family or a single person; and, if the head of a family, of whom does the family consist?

Ans. Head of family consisting of wife & 4 children.

Ques. 6. Is claimant a native-born citizen of the United States; if not, what steps has — taken to become a citizen? (State your knowledge in this regard.)

Ans. He is a Santte Sioux Indian, formerly of the Sioux tribe, born in the United States.

Ques. 7. Has claimant been an inhabitant of the land above described?

Ans. He has.

Ques. 8. Do you live in the vicinity of the land and are you acquainted with the same?

Ans. I do and am well acquainted with same.

Ques. 9. Are there any indications of coal, salines, or min-
230 erals of any kind on this land? (If so, state what they are and whether the springs or mineral deposits are valuable.)

Ans. No.

Ques. 10. Is the land more valuable for agricultural than mineral purposes?

Ans. It is.

Ques. 11. When did claimant first make settlement on the land?

Ans. June 18th, 1873.

Ques. 12. When did claimant establish a residence upon the land?

Ans. June 18th, 1873.

Ques. 13. Up to what time has claimant resided upon the land?

Ans. To present time.

Ques. 14. Has his residence been continuous during the period named?

Ans. It has.

Ques. 15. If claimant had a family during said period of residence, did the family reside on the land?

Ans. They did.

Ques. 16. When was the claimant's house built upon the land?

Ans. June 18th, 1873.

Ques. 17. What other improvements have been made on the land?

Ans. Twenty acres broken.

Ques. 18. What is the total value of the improvements?

Ans. One hundred & fifty dollars.

Ques. 19. For what purpose has the land been used by claimant?

Ans. Farming.

Ques. 20. How much of the land has been broken and cultivated and what crops, if any, have been raised?

Ans. Twenty acres broken; wheat, oats, & corn raised on same.

231 Ques. 21. Has claimant made a homestead entry for other land than that above described? (State your knowledge in this regard.)

Ans. I have no knowledge of him doing so.

Ques. 22. Has claimant alienated any portion of the land—that is, conveyed it to some one else; and, if so, to whom and for what purpose? (State your knowledge in this regard.)

Ans. I have no knowledge that he has.

Ques. 23. Is it your belief that Thomas K. West, the claimant, has acted in good faith in the settlement and improvement of the said land as a homestead?

Have you any knowledge to the contrary?

Ans. It is my belief that he has.

Ques. 24. Are you interested in this claim?

Ans. I am not.

CHARLES HENRY.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimony was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

(Endorsed:) Homestead proof. Testimony of witness. Land office at Sioux Falls, D. T. Original application No. 4788. Final certificate No. 2995. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

232 *Homestead Proof—Testimony of Witness.*

JOHN C. REDWING, being called as a witness in support of the homestead entry of Thomas K. West for S. ½ S. E. ¼ sec. 12 & N. ½ N. E. ¼ sec. 13, t'p 106, R. 49, testifies as follows:

Ques. 1. What is your post-office address?
Ans. Flandreau, D. T.
Ques. 2. What is your occupation?
Ans. Farming.
Ques. 3. Are you well acquainted with Thomas K. West, the claimant in this case, and how long have you known him?
Ans. Known him over six years.
Ques. 4. How old do you know or believe claimant to be?
Ans. 38 years.
Ques. 5. Is claimant the head of a family or a single person; and, if the head of a family, of whom does the family consist?
Ans. Head of family, consisting of wife & 4 children.
Ques. 6. Is claimant a native-born citizen of the United States? If not, what steps has — taken to become a citizen?
(State your knowledge in this regard.)
Ans. He is a Santte Sioux Indian, formerly of the Sioux tribe, born in the United States.
Ques. 7. Has claimant been an inhabitant of the land above described?
Ans. He has.
Ques. 8. Do you live in the vicinity of the land, and are you acquainted with the same?
Ans. I do, and am well acquainted with same.
Ques. 9. Are there any indications of coal, salines, or minerals of any kind on this land? (If so, state what they are and
233 whether the springs or mineral deposits are valuable.)
Ans. No.
Ques. 10. Is the land more valuable for agricultural than mineral purposes?
Ans. It is.
Ques. 11. When did claimant first make settlement on the land?
Ans. June 18th, 1873.
Ques. 12. When did claimant establish a residence upon the land?
Ans. June 18th, 1873.
Ques. 13. Up to what time has claimant resided upon the land?
Ans. To present time.
Ques. 14. Has his residence been continuous during the period named?
Ans. It has.
Ques. 15. If claimant had a family during said period of residence, did the family reside on the land?
Ans. They did.
Ques. 16. When was the claimant's house built upon the land?

Ans. June 18th, 1873.

Ques. 17. What other improvements have been made on the land?

Ans. Twenty acres broken.

Ques. 18. What is the total value of the improvements?

Ans. One hundred & fifty dollars.

Ques. 19. For what purpose has the land been used by claimant?

Ans. Farming.

Ques. 20. How much of the land has been broken and cultivated, and what crops, if any, have been raised?

Ans. Twenty acres broken; wheat, oats, & corn raised on same.

Ques. 21. Has claimant made a homestead entry for other
234 land than that above described? (State your knowledge in this regard.)

Ans. I have no knowledge of him doing so.

Ques. 22. Has claimant alienated any portion of the land—that is, conveyed it to some one else; and, if so, to whom and for what purpose? (State your knowledge in this regard.)

Ans. I have no knowledge that he has.

Ques. 23. Is it your belief that Thomas K. West, the claimant, has acted in good faith in the settlement and improvement of the said land as a homestead? Have you any knowledge to the contrary?

Ans. It is my belief that he has.

Ques. 24. Are you interested in this claim?

Ans. I am not.

JOHN C. REDWING.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimo*by* was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this 26th day of August, 1879.

J. M. WASHBURN, *Receiver.*

(Endorsed:) Homestead proof. Testimony of witness. Land office at Sioux Falls, D. T. Original application No. 4788. Final certificate No. 2995. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

235 Know all men by these presents that Thomas K. West and Sophia, his wife, of Moody county, Territory of Dakota, parties of the first part, for and in consideration of the sum of twenty dollars to them in hand paid by C. E. Thayer, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, convey, and quitclaim unto the said party of the second part, his heirs and assigns forever, all their estate, right, title, and interest in and to the following-described real estate lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The south half of the southeast quarter of section twelve and north half of the northeast quarter of section thirteen, of township one hundred and six north, of range forty-nine west, of 5th P. M.—S. ½ S. E. ¼ 12 and N. ½ N. E. ¼ 13, 106, 49:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said parties of the second part, their heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals this 17th day of June, A. D. 1885.

THOMAS K. WEST. [SEAL.]

her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
A. J. SMITH.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 17 day of June, A. D. 1885, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia K. West, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

236 Witness my signature and notarial seal hereunto affixed the day and year last above written.

ARTHUR J. SMITH,
[SEAL.] *Notary Public.*

(Endorsed:) Quitclaim deed. Ex. "C." Territory of Dakota, county of Moody. Filed for record the 17th day of June, A. D. 1885, at 2.45 o'clock p. m., and recorded in Book 6 of Deeds, on page 327. F. E. Minier, register of deeds. Office of register of deeds, county of Moody, Dakota, *ss:* I hereby certify that the within is a true copy of an instrument which was filed in this office for record on the 17 day of June, A. D. 1886, at 2.45 o'clock p. m., and was duly recorded in Book 6 of Deeds, page 327. Dated Oct. 16, '86. F. E. Minier, register of deeds. Benj. Wyckoff, deputy. (Seal.) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

237 Know all men by these presents that C. C. Thayer and Caddie E. Thayer, — wife, of Jerauld county, Territory of Dakota, party of the first part, for and in consideration of the sum of five hundred dollars, to them in hand paid by S. S. Taylor and S. A. Bidwell, parties of the second part, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, convey, and quitclaim unto the said parties of the second part, their heirs and assigns forever, all their estate, right, title, and interest in and to the following-described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The south half of the southeast quarter of section twelve and the north half of the northeast quarter of section thirteen, of town-

ship one hundred and six north, of range forty-nine west, of 5th P. M.—

S. ½ S. E. ¼ 12 and N. ½ N. E. ¼ 13, 106, 49:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said parties of the second part, their heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals this 19 day of June, A. D. 1885.

C. E. THAYER. [SEAL.]
CADDIE E. THAYER. [SEAL.]

Signed, sealed, and delivered in presence of—
A. J. SMITH.

TERRITORY OF DAKOTA, } *ss:*
Moody County, }

On this 19 day of June, A. D. 1885, before the undersigned, a notary public in and for said county, personally appeared C.
238 E. Thayer and Caddie E. Thayer, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

Witness my signature and notarial seal, hereunto affixed, the day and year last above written.

[NOTARIAL SEAL.] ARTHUR J. SMITH,
Notary Public.

(Endorsed:) Ex. "D." Quitclaim deed. Territory of Dakota, county of Moody. Filed for record the 27th day of June, A. D. 1885, at 10.30 o'clock a. m., and recorded in Book — of ——, page ——. F. E. Minier, register of needs. Benj. Wyckoff, deputy. Office of register of deeds, county of Moody, Dakota, *ss:* I hereby certify that the within is a true copy of an instrument which was filed in this office for record on the 27 day of June, A. D. 1885, at 10.30 o'clock a. m., and was recorded in Book 6 of Deeds, page 335. Dated Oct. 16, '86. F. E. Minier, register of deeds. Benj. Wyckoff, deputy. (Seal.) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

239 Know all men by these presents that Thomas K. West and Sophia West, his wife, of Moody county and Territory of Dakota, parties of the first part, for and in consideration of the sum of two hundred and seventy-five dollars to them in hand paid by Timothy Young, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, to wit: The southwest quarter of the southeast quarter of section twelve (12), in township one hundred and six, of range forty-nine (49), according to Government survey;

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West and Sophia West, his wife, parties of the first part, for themselves, their heirs, executors, and administrators, do covenant with the said party of the second part, his heirs and assigns, that they were well seized in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

And the said Sophia West hereby relinquishes her right of dower in and to the above-described premises.

240 In testimony whereof the said parties of the first part have hereunto set their hands and seals this twenty-fifth day of January, A. D. 1881.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
ALFRED BROWN,
GEO. C. WESTMAN,
Witnesses.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 25th day of January, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. West and Sophia West, his wife, to me personally known to be the identical persons who are described in and who executed the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned; and the said Sophia West, wife of the said Thomas K. West, on a private examination apart from and without the hearing of her said husband, being by me first made acquainted with the contents and meaning of the foregoing deed, thereupon acknowledged to me that she executed the same freely and understandingly, without fear or compulsion of her said husband or any other person, and that she does not wish to retract the same.

Witness my signature and official seal hereunto affixed the day and year last above written.

[NOTARIAL SEAL.] ALFRED BROWN,
Notary Public.

(Endorsed:) Warranty deed. Thomas K. West & wife to Timothy Young. Territory of Dakota, Moody county, *ss:* Filed for

record the 27th day of Jan'y, A. D. 1881, at 10 o'clock a. m., and recorded in Book 2, on page 225. Hans Olson, register of deeds. Ex. "E." Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

241 This indenture, made this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, between Thomas K. West and Sophia West, his wife, of the county of Moody and Territory of Dakota, parties of the first part, and Timothy Young, of the county of Moody and Territory of Dakota, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of nine hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land situate in the county of Moody and Territory of Dakota and known and described as follows, to wit: The south half of the southeast quarter of section No. twelve (12) and the north half of the northeast quarter of section No. thirteen (13), all in township No. one hundred and six (106) north, of range No. forty-nine (49) west, of the 5th principal meridian:

To have and to hold the above quitclaimed premises, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

THOMAS K. WEST. [SEAL.]
her
SOPHIA x WEST. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN EASTMAN,
ALFRED BROWN,
Witnesses.

TERRITORY OF DAKOTA, } ss:
County of Moody, }

242 On this 15th day of June, in the year one thousand eight hundred and eighty-five, before me, Alfred Brown, a justice of the peace in and for said county and Territory, personally appeared Thomas K. West and Sophia West, his wife, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to me that they executed the same.

ALFRED BROWN,
Justice of the Peace for Moody Co., D. T.

(Endorsed:) 669. Ex. "F." Quitclaim deed. Office of register of deeds, county of Moody, D. T. I hereby certify that the within deed was filed in this office for record on the 15th day of June, A. D. 1885, at 8 o'clock a. m., and was duly recorded in Book 6 of Deeds, page 322. F. E. Minier, register of deeds. Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

243 Know all men by these presents that Thomas K. West, of Moody county, Territory of Dakota, part- of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid by Sophia Weston, part- of the second part, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, described as follows, to wit:

The north half of the northeast quarter of section thirteen, in township one hundred and six, range forty nine:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Thomas K. West, party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part, her heirs and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal this thirteenth day of August, A. D. 1881.

244 THOMAS K. WEST. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. ENO.
CHAS. A. PETTIT.

TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 13th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Thomas K. Weston, to me personally known to be the identical person who is described in and who executed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

[NOTARIAL SEAL.] J. H. ENO,
Notary Public.

(Endorsed:) Warranty deed. Thomas K. West to Sophia Weston. Territory of Dakota, Moody county. Filed for record the 7th day of Oct., A. D. 1881, at 9 o'clock and — minutes a. m. Recorded in Book 2 of Deeds, on page 341. Hans Olson, register of deeds. Ex. "G." Territory of Dakota, county of Moody, *ss:* I hereby certify that I have carefully examined the within instrument and compared the same with the original warranty deed, and that it is a true copy of the same, and that the above is a correct copy of the filing thereof. F. E. Minier, register of deeds. (Seal.) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

245 Know all men by these presents that Sophia Weston, of Moody county and Territory of Dakota, party of the first part, for and in consideration of the sum of three hundred dollars to her in hand paid by Alfred Brown, party of the second part, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate, lying and being in the county of Moody and Territory of Dakota, to wit:

The north half of the northeast quarter of section thirteen (13), town. one hundred and six (106), range forty-nine (49):

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever; and the said Sophia Weston, party of the first part, for her heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal this 15th day of August, A. D. 1881.

her
SOPHIA x WESTON. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
J. H. ENO,
JOSEPH CARROW,
Witnesses.

246 TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 15th day of August, A. D. 1881, before the undersigned, a notary public in and for said county, personally appeared Sophia Weston, to me personally known to be the identical person who — described in and who executed the foregoing deed as grantor, and acknowledged the same to be her voluntary act and deed for the purposes therein mentioned.

Witness my signature and official seal hereunto affixed the day and year last above written.

[NOTARY SEAL.] J. H. ENO,
Notary Public.

(Endorsed:) Warranty deed. Sophia Weston to Alfred Brown. Territory of Dakota, Moody county, ss: Filed for record the 17th day of August, A. D. 1881, at 11.45 o'clock a. m., and recorded in Book 2, on page 315. Hans Olson, register of deeds. Ex. "H." Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

247 TERRITORY OF DAKOTA, } ss:
County of Moody, }

In District Court, Fourth Judicial District.

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs,
vs.
ALFRED BROWN, TIMOTHY YOUNG, SAMUEL DARKO-, and JAMES SMITH, Defendants.

I, James Wilson, clerk of the district court of the county of Moody, in the fourth judicial district of Dakota, do hereby certify that the foregoing and annexed papers, marked Exhibits "A" to "H," inclusive, were the original papers and documentary evidence introduced in the trial of this case, viz: Certified record from the General Land Office; patent issued by the Government to Thomas K. West; deed from Thomas K. West and wife to C. E. Thayer and from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell; from Thomas K. West and wife to Timothy Young; from Thomas K. West and wife to Timothy Young; from Thomas K. West to Sophia Weston and from Sophia Weston to Alfred Brown; and I herewith return the same to the supreme court of the Territory of Dakota in accordance with the appeals taken herein by the defendants Alfred Brown and Timothy Young, as appears by the record heretofore certified and returned to said supreme court by me.

Witness my hand and seal this first day of February, A. D. 1888.

JAMES WILSON,
Clerk District Court in and for
[SEAL.] *Moody County, Dakota Territory.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Feb. 6, 1888. J. H. C. Young, clerk.

248 No. 384.

THE UNITED STATES OF AMERICA, *Territory of Dakota*, } ss:

In the Supreme Court.

Appeal from the district court of Moody county.

S. S. TAYLOR and S. A. BIDWELL, Plaintiff- and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendant- and Appellants.

February Term, A. D. 1888.

This action coming on to be heard at the February, A. D. 1888, term of this court, at the supreme court room, in the city of Bismarck, D. T.—present, Bartlett Tripp, chief justice, and Cornelius S. Palmer, William H. Francis, William B. McConnell, Charles M. Thomas, and James Spencer, associate justices—and the appeal herein having been argued by John R. Gamble, Esq., for the appellant, and by C. H. Winsor, Esq., for respondent, and the court having advised thereon, it is now here considered and ordered that the said appeal from the said district court within and for said Moody county appealed from herein be, and the same is hereby, continued for reargument at the May term, 1888, of this court.

By the court:

BARTLETT TRIPP,
Chief Justice of Supreme Court, D. T.

(All concur.)

(Endorsed:) No. 384. In supreme court, Territory of Dakota. February term, 1888. S. S. Taylor and S. A. Bidwell, plaintiffs and respondents, *vs.* Alfred Brown and Timothy Young, defendant- and appellants. Filed in open court this 24th day of February, 1888. J. H. C. Young, clerk.

249 S. A. TAYLOR *et al.* *vs.* ALFRED BROWN *et al.* } No. 55. (384.)

Reargument ordered at next term of the Supreme Court.

250 THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court.

Appeal from the district court of Moody county.

S. S. TAYLOR and S. A. BIDWELL, Plaintiff- and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendant- and Appellants.

384.
May Term,
A. D. 1888.

This action coming on to be heard at the May, A. D. 1888, term of this court, at the supreme court room, in the city of Yankton, Territory of Dakota.

Present: Bartlett Tripp, chief justice, and William H. Francis, William B. McConnell, Charles M. Thomas, James Spencer, and John E. Carland, associate justices; and the appeal herein having been argued by R. J. Gamble, Esq., and J. R. Gamble, Esq., for the appellant, and by C. H. Winsor, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Moody county appealed from herein be, and the same is hereby, reversed, and said action is remanded to said district court with instructions to dismiss the complaint of the plaintiffs and to enter judgment in accordance with the opinion of this court.

And it further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that defendants and appellants have and recover of the plaintiffs and respondents
251 costs and disbursements on this appeal expended, taxed and allowed at one hundred forty-five & $\frac{65}{100}$ dollars.

By the court:

BARTLETT TRIPP,
Chief Justice.

All the justices concurring.

(Endorsed:) 384. In supreme court, Territory of Dakota, May term, 1888. S. S. Taylor and S. A. Bidwell, plaintiff- and respondents, *vs.* Alfred Brown and Timothy Young, defendant- and appellants. Filed in open court this 25th day of May, 1888. J. H. C. Young, clerk.

252 TAYLOR and BIDWELL, Respondents,
vs.
BROWN and YOUNG, Appellants.

21. 384.

This case is reversed upon the ground that the statute imposing the limitation upon alienation should be construed to intend the grant and limitation to take their inception from the same moment

of time; otherwise and if construed to intend the limitation to commence upon the day succeeding the grant a period of time would intervene in which the limitation would not be operative, and a conveyance could be made by the grantee which would nullify the benefit intended to follow from the restriction imposed.

253 In the Supreme Court of the Territory of Dakota

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.
} May Term, 1888.

Statement of Costs and Disbursements on Appeal.

Before argument	$5 00
For argument	15 00
Term fees, 1 term	5 00
Express and postage	2 50
Printing abstract and brief	98 00
Clerk's fees, district court:	
Certificates to record	70
Fees clerk supreme court:	
Docketing, indexing, &c.	2 00
Feb. 2. Entering & filing transcript, 36 p.	3 75
Feb. 2. Entering & filing assignment of errors (Brown), 1 p.	25
Feb. 2. Entering & filing assignment of errors (Young), 1 p.	25
Entering & filing appellants' brief, 12 p.	1 35
Entering & filing appellants' abstract, 1 p.	1 35
Entering & filing additional trans., 23 p.	2 45
Entering cause on judge's calendar	1 05
Entering cause called	30
Entering and filing respondents' brief, 12 p.	1 35
Entering cause argued	30
Entering cause continued for reargument	30
Entering cause on judge's calendar	1 05
Entering cause called	30
Entering cause argued	30
Wrote judgment	60
Judgment handed down and filed	40
Entering judgment and recording	75
Remittitur	1 00
Certificate and seal	35
Total	$145 65

TERRITORY OF DAKOTA, } ss:
County of Yankton, }

John R. Gamble, being duly sworn, deposes and says that he is one of the attorneys for the appellants in the above-entitled action, and that the disbursements above mentioned have been or will be necessarily made or incurred in this action in the supreme court, to the best of deponent's knowledge, information, and belief.

JOHN R. GAMBLE.

Subscribed and sworn to before me this 31st day of May, 1888.

[NOTARY SEAL.] EDWARD MAGLONE,
Notary Public.

254 To the plaintiff- above named:

Please take notice that the defendants and appellants in this action will present to the clerk of the supreme court of the Territory of Dakota, at his office, in the court-house, in the city of Yankton, D. T., on the 8th day of June, 1888, at 2 o'clock p. m. of that day, the above and foregoing bill of costs and disbursements for taxation and adjustment and to have the same inserted in the judgment in this action in said court.

Dated at Yankton, D. T., this 31st day of May, 1888.

Yours, &c., GAMBLE BROTHERS,
Attorneys for Defendants & Appellants.

Costs and disbursements in above cause taxed and allowed June 8, 1888, at one hundred and forty-five & $\frac{65}{100}$ dollars.

J. H. C. YOUNG, *Clerk.*

Done at Yankton, D. T.

(Endorsed:) Supreme court, Territory of Dakota. S. S. Taylor & S. A. Bidwell *vs.* Alfred Brown & Timothy Young. Notice of taxation of costs. Due personal service of the within notice is hereby admitted this — of June, A. D. 1888, at Sioux Falls, Dakota. C. H. Winsor, attorney for pl'ffs & resp's. Gamble Bros., attorneys for def'ts & appellants, Yankton, Dakota.

255 In the Supreme Court of the Territory of Dakota, at Deadwood, D. T., October Term, A. D. 1888.

S. S. TAYLOR and S. A. BIDWELL, Appellants,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Respondents.

To the supreme court of the Territory of Dakota:

The above-named S. S. Taylor and S. A. Bidwell desire to appeal from the decision of this court rendered at the Yankton term, May, A. D. 1888, to the Supreme Court of the United States, and ask the honorable court to allow said appeal and to fix the amount of bond that will be required in perfecting said appeal.

C. H. WINSOR,
Attorney for Appellants.

(Endorsed:) In the supreme court of the Territory of Dakota, October term, A. D. '11. S. S. Taylor and S. A. Bidwell, appellants, *vs.* Alfred Brown and Timothy Young, respondents. 384. Supreme court of the Territory of Dakota. Filed Oct. 1, 1888. J. H. C. Young, clerk. C. H. Winsor, att'y for appellants.

256 TERRITORY OF DAKOTA, } *ss:*
Lawrence County, }

In the Supreme Court of the Territory of Dakota, at Deadwood, D. T., October Term, A. D. 1888.

S. S. TAYLOR and S. A. BIDWELL, Appellants,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Respondents.

C. H. Winsor, being first duly sworn, upon his oath deposes and says he is the attorney for the above-named S. S. Taylor and S. A. Bidwell, who desire to appeal to the Supreme Court of the United States from the judgment of this court rendered May 25th, A. D. 1888; that the property in dispute in this case is of the value of more than five thousand ($5,000.00) dollars, exclusive of interest or costs.

C. H. WINSOR,
Att'y for Appellants.

Subscribed and sworn to before me this 1st day of October, A. D. 1888.

J. H. C. YOUNG,
[SEAL.] *Clerk Supreme Court, Dakota Ter.*

(Endorsed:) In the supreme court of the Territory of Dakota, October term, A. D. 1888. S. S. Taylor and S. A. Bidwell, appellants, *vs.* Alfred Brown and Timothg Young, respondents. C. H. Winsor, att'y for appellants. Supreme court of the Territory of Dakota. Filed Oct. 1, 1888. J. H. C. Young, clerk.

257 In the Supreme Court of the Territory of Dakota, at Deadwood, D. T., October Term, A. D. 1888.

S. S. TAYLOR and S. A. BIDWELL, Appellants,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Respondents. } Order.

On reading and filing the petition of S. S. Taylor and S. A. Bidwell and the affidavit of C. H. Winsor, their attorney, it is—

Ordered that an appeal be allowed from the decision of this court rendered at Yankton term, in May, A. D. 1888, to the Supreme Court of the United States upon the plaintiffs giving the usual bond in the sum of one thousand ($1,000.00) dollars within ninety days.

By the court:

BARTLETT TRIPP,
Chief Justice.

Attest: J. H. C. YOUNG, *Clerk.*

(Endorsed:) In the supreme court of the Territory of Dakota, October term, A. D. 1888. S. S. Taylor and S. A. Bidwell, appellants, *vs.* Alfred Brown and Timothy Young, respondents. Order. C. H. Windsor, att'y for appellants. 384. Supreme court of the Territory of Dakota. Filed Oct. 2, 1888. J. H. C. Young, clerk.

258 Dakota Territory Supreme Court.

S. S. TAYLOR and S. A. BIDWELL, Appellants,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Respondents,

Upon motion of appellants, and after due consideration of the application of appellants to file bond on appeal to the Supreme Court of the U. S. heretofore allowed in the above-entitled action—

Ordered that said appellants be, and they are hereby, allowed to file a proper bond on said appeal as of the date of the allowance of said appeal.

By the court:

BARTLETT TRIPP,
Chief Justice.

Dated Feb. 8th, 1889.

(Endorsed:) 384. S. S. Taylor and S. A. Bidwell, respondents, *vs.* Alfred Brown and Timothy Young, appellants. Order allowing appellants to file a proper bond on appeal to Supreme Court U. S. Supreme court of the Territory of Dakota. Filed Feb. 8, 1889. J. H. C. Young, clerk.

259 TERRITORY OF DAKOTA, *ss:*

In the Supreme Court within and for Dakota Territory.

S. S. TAYLOR and S. A. BIDWELL, Appellants,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Respondents.

Whereas on the — day of ——, 18—, in the supreme court within and for the Territory of Dakota, the above-named respondent- recovered a judgment against the above-named appellant- reversing the judgment of the district court of the fourth judicial district of Dakota Territory in & for Moody county and directing the court belos to enter judgment dismissing plaintiffs' complaint;

And the above-named appellant-, feeling aggrieved hereby, intend to appeal therefrom to the Supreme Court of the United States; and whereas the said supreme court of Dakota Territory did, in open court, at the Oct. term, 1888, allow said appeal on filing an undertaking in the sum of $1,000.00:

Now, therefore, we do hereby undertake that the said appellant- will pay all costs and damages which may be awarded against us on said appeal or on a dismissal thereof not exceeding one thousand

dollars, and do also undertake that if the said judgment so appealed from or in any part thereof be affirmed or said appeal dismissed the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

A. M. TAYLOR.
A. J. BIDWELL.

Dated December 20, 1888.

260 TERRITORY OF DAKOTA, } ss:
Moody County, }

On this 20th day of December, A. D. 1888, before me, the subscriber, appeared A. J. Bidwell and A. M. Taylor, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

GEORGE M. SMITH,
[NOTARY SEAL.] *Notary Public, D. T.*

TERRITORY OF DAKOTA, } ss:
County of Moody, }

A. J. Bidwell and A. M. Taylor, being severally sworn, each for himself says: The said A. J. Bidwell says he is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of $2,000.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said A. M. Taylor for himself says that she is a resident and freeholder of the county of Moody, in this Territory, and that he is worth the sum of $2,000.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

A. M. TAYLOR.
A. J. BIDWELL.

Subscribed and sworn to before me this 20th day of December, 1888.

GEORGE M. SMITH,
[NOTARIAL SEAL.] *Notary Public, D. T.*

(Endorsed:) Territory of Dakota. In supreme court. I
261 hereby approve the within undertaking. John E. Carland, associate justice of the supreme court of Dakota Territory. Undertaking on appeal to Supreme Court of United States. Supreme court of the Territory of Dakota. Filed Feb. 8, 1889. J. H. C. Young, clerk. Filed as of date of order allowing appeal as per order herewith. J. H. C. Young, clerk.

262 UNITED STATES OF AMERICA, *ss:*

To Alfred Brown and Timothy Young, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October, 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota, wherein S. S. Taylor and S. A. Bidwell are appellants and you are respondents, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

263 TERRITORY OF DAKOTA, } *ss:*
County of Moody, }

R. Brennan, being first duly sworn, says he resides in the county of Moody, and that on the 7th day of March, 1889, was over the age of twenty-one years; that on said 7th day of March, 1889, affiant personally served the annexed citation upon Alfred Brown and Timothy Young, named therein, by delivering to and leaving with each of them personally a true copy thereof at the county of Moody and Territory of Dakota, and that said affiant personally knows the said persons served to be the within-named Alfred Brown and Timothy Young.

R. BRENNAN.

Subscribed and sworn to before me this 8th day of March, 1889.

GEORGE M. SMITH,
[NOTARIAL SEAL.] *Notary Public, D. T.*

264 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

A. B. Kittredge, being first duly sworn, says he resides in the city of Sioux Falls, in said county, and that on the 21st day of February, 1889, was over the age of twenty-one years; that on the said 21st day of February, 1889, affiant personally served the annexed citation upon Gamble Bros., attorneys of record of Alfred Brown and Timothy Young named therein, by delivering to and leaving with R. J. Gamble, Esq., personally, a member of the law firm of Gamble Bros., attorneys as aforesaid, a true copy thereof, at their office in the city of Yankton, in the county of Yankton, D. T., and that affiant knows the said R. J. Gamble to be a member of said firm, and that said firm are attorneys of record of the said Brown and Young.

A. B. KITTRIDGE.

Subscribed and sworn to before me this 28th day of February, 1889.

FRANK W. HULLIGAV,
Notary Public, Dakota.

[NOTARIAL SEAL.]

(Endorsed:) Original. Service of the within citation is hereby admitted this 21 day of February, 1889. ——— ———, def'ts' attorneys. Supreme court of the Territory of Dakota. Filed Mar. 11, 1889. J. H. C. Young, clerk.

265 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court.

Cause:

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Filed February 1, 1888.

Journal Entries.

In Supreme Court, February Term, A. D. 1888.

Tuesday, February 7, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Counsel answers ready.

* * * * * * *

Saturday, February 18, 1888, being the eleventh day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Cause argued.

266 Friday, February 24, 1888, being the sixteenth day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Continued for reargument at May term of this court.

In Supreme Court, May Term, A. D. 1888.

Tuesday, May 8, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Counsel answers ready.

* * * * * * *

Saturday, May 19, 1888, being the eleventh day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

267 Cause reargued.

* * * * * * *

Tuesday, May 25, 1888, being the sixteenth day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Judgment of the district court within and for Moody county reversed and action is remanded to said district court with instructions to dismiss the complaint of plaintiffs and to enter judgment in accordance with the opinion of this court.

* * * * * * *

Monday, October 1, 1888, being the seventeenth day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Counsel for appellants asks the court to allow appeal to the Supreme Court of the United States.

In Supreme Court, October Term, A. D. 1888.

Tuesday, October 2, 1888, being the first day of the term.

* * * * * * *

268 In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Appeal to the Supreme Court of the United States allowed upon plaintiffs giving the usual bond in sum of one thousand dollars within ninety days.

* * * * * * *

Wednesday, October 10, 1888, being the eighth day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Opinion, Thomas, J., filed.

In Supreme Court, February Term, A. D. 1889.

Tuesday, February 5, 1889, being the first day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Counsel for plaintiffs asks to be allowed to complete appeal to the Supreme Court of the United States granted at October term, A. D. 1888.

* * * * * * *

269 Friday, February 8, 1889, being the fourth day of the term.

* * * * * * *

In—

S. S. TAYLOR and S. A. BIDWELL, Plaintiffs and Respondents,
vs.
ALFRED BROWN and TIMOTHY YOUNG, Defendants and Appellants.

Upon motion of counsel for plaintiffs, after due consideration of application to file bond on appeal to the Supreme Court of the United States heretofore allowed—

Ordered that said plaintiffs be, and they are hereby, allowed to file a proper bond on said appeal as of the date of the allowance of said appeal.

270 THOMAS, *J.*:

This action was brought by the respondents against the appellants and others, in the district court of Moody county, for the purpose of removing alleged clouds upon their titles to certain real estate described in the complaint, by reason of alleged deeds of conveyance of the same lands to the appellants, which they allege to be illegal and void, and ask that they be so adjudged by the court. The appellants Alfred Brown and Timothy Young were the only defendants served with process, and they served and filed separate answers, in which they set up their said titles to said real estate, and by way of counter-claims prayed that their titles be quieted, and that respondents' pretended claim to said lands be adjudged null and void. The district court, after hearing the case, rendered judgment in favor of respondents. Appellants each moved the court for a new trial, which was refused, and they separately appeal to this court.

The facts, as they appear from the findings of the district court, are substantially as follows: On the 15th day of June, 1880, one Thomas K. West, a Santee Sioux Indian, became the owner of the lands described in the pleadings by a patent from the United States. The said West, being an Indian, received his title under the provisions of the statute of the United States giving certain Indians who should abandon their tribal relations the right to enter and hold lands under the homestead law. The statute above referred to contains the following proviso: "Provided, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for the period of five years from the day of the date of the patent therefor." 18 U. S. St. at Large, 420. The appellants herein received deeds of conveyance from said West for three 40-acre tracts of land some time in the year 1881. Appellant Timothy Young took a new deed from said West for the entire 160 acres on the 15th day of June, 1885. On the 17th day of June, 1885, said West also conveyed by deed said entire tract of land to one Thayer, who on the 19th day of the same month conveyed it to

the respondents. These deeds were all regular as to form and were duly recorded in the order of their respective dates.

The main question, therefore, presented in this case is, Who is the owner of the lands in controversy? The appellants appealed separately from the judgment of the district court, which made separate finding as to them, both of whom assign a long and numerous list of alleged errors, the most of which we do not deem it necessary to consider in detail, as there are only two or three points seriously relied on by appellants to reverse the judgment of the district court. It is contended on behalf of both the appellants that the district court erred in holding that their deeds from West, received by them in the year 1881, were void, for the reason: First, the patent to said West from the United States was absolute on its face and conveyed to him a title in fee; second, the court erred in deciding that the deeds to Thayer and from him to respondents were valid because of the adverse possession of Brown as against them. The question of the adverse possession of Brown as against Young is not raised. In case this court should sustain the views of the district court on these points appellant Timothy Young insists that the district court erred as a matter of law in holding that his deed of June 15, 1885, was executed within the five years from the date of the patent, and for that reason void. It will be observed that the appellants, while taking separate appeals, are really hunting in couples so far as this case is concerned, and therefore they make no point as to the rights of each other, but are content if either shall succeed in obtaining judgment for the lands. Brown does not controvert the posttion of Young, but says, through his counsel, that he shall be content with a conclusion in favor of said Young's position, and consents in that event that judgment may be entered as prayed for by said Young.

We shall first consider the two propositions, one of which involves the validity of deeds to appellants of date 1881; the other the validity of deeds to respondents' grantor of date the 17th of June, 1885, as affected by the adverse possession of Brown. The patent issued to West was in the usual form and made no reference to the fact that he was an Indian, but was absolute on its face, and, so far as could be gathered from its contents, was a conveyance in fee, and, but for the inhibition of the statute heretofore quoted, there could be no question as to the regularity and validity of the deeds to appellants executed in 1881. It is contended by counsel for
271 appellants, and not without some force, that, notwithstanding the limitations sought to be ingrafted on the patent by the statute, none of which were embraced or recited therein, the conveyances should be held to be good and valid, because purchasers were not bound to look *dehors* the terms of the patent, but had the right to rely upon its contents alone in order to discover the extent and scope of said West's title. This proposition, as before intimated, is not without some show of reason, and, if it were a new and original question, we should feel some hesitancy in holding otherwise; but, upon investigation, we find that the courts have frequently had occasion to pass upon this question, and they uniformly, so far as we have been able to discover, hold that statutes similar to the one

sought to be invoked herein prevail over recitals of the deed or patent. It is true it may seem to be a harsh rule that a party about to purchase lands from another cannot rely upon the title of the grantor as disclosed by the record, and perhaps it would have been safer and less harmful to all parties had the land department seen proper to recite the limitations of the statute in the patent; but the fact that it was not done does not, in our opinion, relieve them from the effect of the law, which they are presumed to know. This law was a general one in regard to Indians in the United States, concerning their power of holding lands, and the parties purchasing of them were chargeable with notice of said law. It is the same as though the statute had said that no contracts made with the Indians residing in the United States in relation to the sale of lands without the consent of the President or the Secretary of the Interior should be valid; yet we apprehend that it will not be contended that a contract with the Indians not in compliance with such statute could be enforced. We do not treat the statute altogether as an attempt to limit the title of the Indian to the lands, but rather as placing upon him a disability which begins with the date of the patent and continues for the period of five years thereafter. Hence one dealing with the Indians in the purchase of lands must not only see that he has a good and perfect title of record, but must also see that he is not laboring under any disability which prevents him from making a good and valid deed. We therefore conclude that it was not within the power of the Indian, Thomas K. West, to alienate the land in the year 1881, at which time the deeds to appellant were executed, and they therefore obtained no title by reason of these pretended conveyances.

This view of the case is upheld and discussed in the cases of Jackson *v.* Goodell, 20 Johns., 188, 693; Lee *v.* Glover, 8 Cow., 188, and St. Regis Indians *v.* Drum., 19 Johns., 127. All of these cases passed upon similar questions to the one involved in the construction of the statute under consideration in the case at bar and involved the power of the Indians residing in the State of New York, who held patents from the people of said State to certain lands, which upon their face purported to convey said lands in fee; yet they all hold unequivocally—including so respectable authority as the learned and renowned Chancellor Kent—that the laws of the State, which provided, in substance, that no Indian residing within the State can make any contract concerning the sale of lands within the State or otherwise dispose of any such lands or any interest therein without the authority or consent of the legislature, must prevail over the recital of the patent, and hold that contracts made by these Indians for the sale of their lands not in compliance with the terms of the statute were null and void; and as these cases, so far as we have been able to discover, have not been modified or overruled by any of the more modern cases, we shall treat them as announcing the law on the subject.

We shall next consider the effect of the adverse possession of Brown upon the validity of the deed to Thayer and to his grantees, the respondents, which were executed on the 17th and 19th of June,

1885, after the disability of the Indian had ceased to exist. Adverse possession of land, in order to defeat or avoid a deed made subsequently to another, must be in good faith and under color of title; but can one set up color of title under a deed of conveyance
272 which is absolutely null and void? It is clear that it cannot be done where the possession is under a deed obtained by fraud, and it seems to us equally clear that a void deed cannot initiate or be the foundation of an adverse possession that will defeat a subsequent conveyance of the land. In the case at bar the appellant Brown came into the possession of the land under a deed that its owner had no power to make, and, as the findings of the district court show, he knew his grantor was an Indian at the time of the transaction, and therefore he is to be held to have known, at least in legal effect, of the disability resting on his grantor at the time of the pretended conveyance, for all persons are presumed to know the law. We cannot, therefore, say that he was in possession in good faith under color of title. To hold otherwise would defeat the evident intention of the statute and permit the appellant Brown, with the law staring him in the face, to initiate a species of deed and color of title which would in effect nullify the law and defeat the protection sought to be thrown around this Indian by the Government and to abrogate the conditions upon which the Government parted with its title to the land. The statute in question is a part of much similar legislation on the part of the United States Government since its foundation, which was enacted on the ground that the Indians were wards and under the tutelage and care of the General Government, and that such legislation was necessary to protect them in their property and rights against the superior skill and knowledge, stimulated to its utmost activity by the well-known greed and avarice of the white man. Hence, under all the circumstances and the evident intention of those who enacted the statute, we are of the opinion that the deeds of 1881 were null and void, and the adverse possession of appellant Brown by reason thereof was not in law in good faith and under such color of title as could defeat or avoid a subsequent conveyance executed after the Indian had been relieved of his disability.

But assuming, for the sake of the argument, that we are wrong in the foregoing conclusions and that the deed is not void, but voidable only, as in cases of infants, let us look at this aspect of the case and see what result is reached. The law worked a deprivation of the power of alienation on the part of the Indian for the period of five years, and is therefore somewhat analogous to the status of an infant with reference to a similar power. As a rule, and especially in this Territory, deeds of infants are voidable only; so that if there is no disaffirmance by the infant after he attains his majority his deed is valid and title passes. Civil Code, §§ 15, 17; Hastings *v.* Dollarhide, 24 Cal., 195; Irvine *v.* Irvine, 9 Wall., 617. But the giving of another deed, within a reasonable time after his disability ceases, is clearly a disaffirmance of the deed given during his infancy. 24 Cal., *supra*. Hence, as the law permits disaffirmance by a subsequent deed which, *ex propria vigore*, makes void the prior deed, therefore the subsequent

deed, made after majority, is valid, notwithstanding section 681 of the Civil Code. If this is not true, we have the anomaly of the law both permitting and forbidding, at one and the same time, the same thing, which is not only inconsistent, but absurd; for if the first voidable deed prevents the second disaffirming deed, then no disaffirmance by an infant in this mode is permitted, though the courts hold otherwise, and the civil code of this Territory is not *contra*. In the case at bar the Indian Thomas K. West disaffirmed the deeds of 1881 to Brown by the subsequent deeds made to Young and Thayer within a day or two after his disability ceased; so we must conclude even in this aspect of the case that the adverse possession of Brown was subject to the right of said West to disaffirm his deed to Brown by subsequent deeds, and therefore the adverse possession of Brown could not defeat or avoid them.

We shall now consider what we deem the vital point in this case, which is the question as to the effect and validity of the deed of date the 15th of June, 1885, the fifth anniversary of the date
273 of the patent. It is contended by counsel for respondents that the 15th of June, 1885, was within the period of limitation, and the deed of that date to appellant Young gave him no title to the lands by reason of this fact; that in the computation of time, when an act is to be done, it is a well-settled rule that the first day is to be excluded, and in apparent support of this proposition cites numerous authorities. It is clear, if this proposition is correct, the deed of that date is invalid; but we cannot agree with counsel for respondents that the rule, as he states it, is well settled, but, on the contrary, the question whether the *terminus a quo* should be excluded or included is a vexed question and has been for a "time whereof the memory of man runneth not to the contrary" and has harassed and perplexed courts and learned doctors of both the common and civil law from the earliest times down to the present day. It has been very appropriately termed by a distinguished writer of the Roman law the *controversia controversissima*. It is also insisted in behalf of this contention of respondents that the day *a quo* should be excluded under the provisions of our Code of Civil Procedure, which provides in section 6 that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then that is also excluded." But we apprehend this rule as laid down in the Code of Civil Procedure only establishes the rule as to matters of practice in this Territory, and does not intend to fix the rule concerning matters of a general nature to which it has no relation, and therefore has no bearing on the question under consideration. It seems, so far as we have been able to discover from quite an extensive rummage and examination of the authorities on the subject, that the courts of both this country and England have excluded and included the *terminus a quo*, doing the one or the other as the context and subject-matter seemed to indicate and justify. In the case of Pugh *v.* Duke of Leeds, Cowp., 714, which seems the leading case in the English courts, and which has remained the proper exposition of this vexed question, and which

involved the validity of a lease and the power reserved in a marriage settlement to one Edwards to make leases, with many restrictions and qualifications, *inter alia*, the following: "That they were not to be in reversion, remainder, or expectancy;" the question was whether the lease was in possession, and turned upon the question of excluding or including the day of the date of the deed. The opinion in that case was delivered by that eminent jurist, Lord Mansfield—of whom it can be truthfully said he always walked, as it were, upon the mountain ranges of the law—in which he used the following language: "I will first consider it as supposing this a new question, and that there never had existed any litigation concerning it. In that light the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law, no technical form. All that is required is only enough to show that it is a lease in possession and not in reversion, and therefore if the words used are sufficient for that purpose the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it be construed exclusive or inclusive of the *terminus a quo*. While the gentlemen at the bar were arguing this case a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date, inclusive,' the term would have commenced immediately. If they had said 'from the day of the date, exclusive,' it would have commenced the next day. But let us see whether the context and subject-matter in this case do not show that the construction here should be inclusive as demonstratively as if the word 'inclusive' had been added. This is a lease made under a power. The lease refers to the
274 power, and the power requires that the lease should be a lease in possession. The validity of it depends upon its being in possession, and it is made as a provision for an only daughter. He must therefore have intended to make a good lease. The expression, then, compared with the circumstances, is as strong in this respect of what his intention was as if he had said, 'I mean it as a lease in possession,' or 'I mean it shall be so construed.' If it is so construed, the word 'from' must be inclusive. This construction is to support the deeds of the parties and give effect to their intention, and to protect property. The other is a subtlety to overturn property and defeat the intention of the parties without answering one good end or purpose whatever. To conclude the grounds of this opinion and judgment which I now deliver is that 'from' may in vulgar use and even in the strictest propriety of language mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense, which made their deed effectual." We have quoted from the case *supra* at considerable length for the reason that we deem it a lucid and able exposi-

tion of this vexatious question, albeit his lordship may seem at first blush to have labored under great stress of judicial weather; but, in our opinion, he succeeded in severing the Gordian knot with which this question has so long been entangled, but in doing so he had to strip it of its subtleties which seemed to hang around about it and dissipate the clouds that darkened it by reason of conflicting decisions of the courts, the which he did by letting in the sunlight of reason and common sense. This case has since been followed in the case of Glassington *v.* Rawlins, 3 East, 407, and other English cases, and this doctrine is also upheld in the courts of this country both Federal and State. *Vide* Arnold *v.* U. S., 9 Cranch, 119; Griffith *v.* Bogart, 18 How., 158; Sheets *v.* Selden's Lessee, 2 Wall., 117; Dutcher *v.* Wright, 94 U. S., 553; Price *v.* Whitman, 8 Cal., 412; Lysle *v.* Williams, 15 Serg. & R., 135; Wright *v.* Forrestal, 65 Wis., 340; 27 N. W. Rep., 52. We do not claim that there is a uniformity of decisions of the courts of this country in regard to this question, but we admit that there is somewhat of conflict; but from a thorough examination of them we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties the *dies a quo* will be included, otherwise they will be excluded. We think that the word "from," in its literal and restricted sense, means "exclusive," but it may be used in a connection that means inclusive, and it is quite frequently used in the latter sense; and therefore in construing it courts will take into consideration the context and subject-matter and construe it to mean either inclusive *or* exclusive, accordingly as it is influenced by its connection. Applying the doctrine of the case of Pugh *v.* Duke of Leeds, and other cases cited *supra*, to the case at bar, it seems to us that we are compelled to include the day of the date of the patent to said West, and as a matter of course decide that the 15th day of June, 1885, the day on which he conveyed the land to appellant Young, was not within the period of limitation of the statute, and therefore the deed to said Young of that date was valid. We might properly arrive at this conclusion by treating the Indian as a minor and applying the law of this Territory in regard to minors and hold that the disability ceased the day before the fifth anniversary of the date of the patent; but we think that the following conclusion is clearer and irresistible. It was clearly the intention of the statute under which said West obtained the patent to the lands that he should be deprived of the power to alienate it for the period of five years from the date thereof; hence, if we exclude the day of its date in the computation of the time during which he was to be deprived of this power, we place it within his power to defeat the object of the law. Suppose the patent had been issued and delivered to him at 10 o'clock a. m. of the day of its date, what was there to prevent him from alienating land between that hour and the hour of midnight of that day or at any time previous to the beginning of the next day if the *terminus*

a quo be excluded? In which event we would have an anomalous, incongruous, not to say absurd, statute, containing within itself seeds the germination of which might defeat its object at the very threshold of its existence, for it is absolutely certain that West could have legally conveyed the land at any time after the issuance of the patent during the day of its date, unless said day be included in the computation of the five years during which the disability or limitation was in existence. It seems to us that this proposition is so clear and axiomatic that it is unnecessary to elaborate or discuss it at length. We therefore conclude that the day of the date of said patent should be included, and that the deed to Young for the entire 160 acres of land is good and valid conveyance, and the judgment of the district court is reversed, and judgment ordered to be entered below in accordance with this opinion and as prayed for in the separate answer and counter-claim of appellant Timothy Young, all the justices concurring.

275 UNITED STATES OF AMERICA, *ss:*

To Alfred Brown and Timothy Young, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October, 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota, wherein S. S. Taylor and S. A. Bidwell are appellants and you are respondents, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

276 TERRITORY OF DAKOTA, }
County of Moody, } *ss:*

R. Brennan, being first duly sworn, says he resides in the county of Moody, and that on the 7th day of March, 1889, was over the age of twenty-one years; that on said 7th day of March, 1889, affiant personally served the annexed citation upon Alfred Brown and Timothy Young named therein by delivering to and leaving with each of them personally a true copy thereof at the county of Moody and Territory of Dakota, and that said affiant personally knows the said persons served to be the within-named Alfred Brown and Timothy Young.

R. BRENNAN.

Subscribed and sworn to before me this 8th day of March, 1889.
[Seal George M. Smith, Notary Public, Moody County, Dakota T'y.]

GEORGE M. SMITH,
Notary Public, D. T.

277 TERRITORY OF DAKOTA, } *ss*:
County of Minnehaha, }

A. B. Kittredge, being first duly sworn, says he resides in the city of Sioux Falls, in said county, and that on the 21st day of February, 1889, was over the age of twenty-one years; that on the said 21st day of February, 1889, affiant personally served the annexed citation upon Gamble Bros., attorneys of record of Alfred Brown and Timothy Young, named therein, by delivering to and leaving with R. J. Gamble, Esq., personally, a member of the law firm of Gamble Bros., attorneys as aforesaid, a true copy thereof at their office, in the city of Yankton, in the county of Yankton, D. T., and that affiant knows the said R. J. Gamble to be a member of said firm, and that said firm are attorneys of record of the said Brown and Young.

A. B. KITTREDGE.

Subscribed and sworn to before me this 28th day of February, 1889.

[Seal Frank W. Halligan, Notary Public, Minnehaha County, D. T.]

FRANK W. HALLIGAN,
Notary Public, Dakota.

278 [Endorsed:] Original. Service of the within citation is hereby admitted this 21 day of February, 1889. ——— ———, def'ts' attorneys. Supreme court of the Territory of Dakota. Filed Mar. 11, 1889. J. H. C. Young, clerk.

279 TERRITORY OF DAKOTA, *ss*:

In Supreme Court.

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein S. S. Taylor and S. A. Bidwell are plaintiffs and respondents *versus* Alfred Brown and Timothy Young, defendants and appellants, as the same now remains of record in said court, together with copies of the journal entries of the supreme court of the Territory of Dakota, so far as relates to said case; also that the citation herewith is the original citation issued by said supreme court of the Territory of Dakota.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 31 day of August, A. D. 1889.

[Seal Supreme Court of Dakota Territory.]

JAMES H. C. YOUNG, *Clerk.*

(Original citation herewith; also copy.)

Endorsed on cover: Case No. 13,666. Dakota Territory supreme court. No. 112. S. S. Taylor and S. A. Bidwell, appellants, *vs.* Alfred Brown and Timothy Young. Filed September 30, 1889.

147 U.S. 640

Office Supreme Court U. S.
FILED.
OCT 17 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG, RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR APPELLANTS.

C. H. WINSOR,
Attorney for Appellants.

Will A. Beach, Printer, Sioux Falls.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG, RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR APPELLANTS.

This is an action brought by the appellants against the respondents in the District Court of Moody County, Territory of Dakota, under the statute of the Territory of Dakota to determine conflicting claims to real property. The District Court after hearing the case rendered judgment in favor of the appellants. The respondents then appealed to the Supreme Court of the Territory of Dakota, where the cause was reversed and the Court below ordered to enter judgment as prayed for by respondents.

The undisputed facts are substantially as follows: On the 15th day of June, 1880, the United States issued a patent dated on that day to one Thomas K. West, a Santee Sioux Indian, under the 18th U. S. Statutes at Large, 420, which gave certain Indians who should abandon their tribal relations, the right

to enter and hold lands under the homestead law under the following proviso: "Provided, however, that the title to lands acquired by any Indian, by virtue hereof, shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree or order of any Court, and shall be and remain inalienable for the period of five years from the date of the patent therefor."

The respondent Young had on the 25th day of January, 1881, taken a deed to forty acres of this land from West and wife (Exhibit "E" page 71 of Record). The respondent Brown had on the 13th day of August, 1881, taken a deed to eighty acres of this land (Exhibit "G" page 76 of Record). It appears from the testimony of both respondents (pages 75, folio 121, and 79, folios 125 and 126), that the appellant Bidwell claimed the other forty acres, and had been in possession of it and made improvements upon it. It further appears that on the 15th day of June, 1885, Young got a quit-claim deed of the entire quarter section from West and wife, which was acknowledged before his co-respondent Brown, and also witnessed by Brown (Exhibit "F" page 72 Record), and that on the 17th of June, 1885, West and his wife conveyed the same premises to one C. E. Thayer, who on the 19th of June, 1885, conveyed the same premises to the appellants herein (Exhibit "C" and "D" pages 68 and 69 Record). It also appeared that Taylor, Bidwell and Young had each of them been in possession of certain portions of the premises severally and made improvements thereon prior to the 15th day of June, 1885.

The question presented in the case therefore is, who is the owner of the lands in controversy? Three questions were presented both in the trial of the cause

in the District Court and in the Supreme Court by the respondents here:

First. That the patent being regular on its face and saying nothing of the limitation a grantee from the patentee would take title without reference to the proviso in the law under which the title was issued from the Government.

Second. That because at the time of the delivery of the deeds from West to Thayer and Thayer to the plaintiffs (the appellants here), the real property was in the actual possession of persons claiming title adverse to the grantors, and therefor that they were void within the Dakota statute, Section 681 of the Civil Code, and

Third. That the five years from the date of the patent for the land had expired before West and his wife deeded to Young. In other words, that the 14th day of June, 1885, was the last day of the five years provided for by the statute.

The first two questions were decided in favor of the appellants by the Supreme Court of Dakota Territory. The third question was decided in favor of the respondents, holding that the five years expired on the 14th of June, 1885, and therefore the deed from West and his wife to Young, dated June 15th, 1885, was a good and valid convevance, and vested the title in Young. Therefore, that is the only error we can complain of, and under the rules we suppose our brief and argument is limited to that question.

ASSIGNMENT OF ERROR.

That the Court erred in holding that in the computation of time the day of the date of the patent to

West should be included as part of the five years of prohibition.

Argument-

The question then, as to whether the five years limitation expired on the 14th or 15th of June, 1885, presents the vexed question so often before the courts, and on which so many different decisions have been made as to whether the first day, the "*terminus a quo*," shall be included or excluded.

In discussing this question we think it should be treated, not as one in reference to the rights of the parties under their various deeds, but as to what the intention of the Government of the United States was in passing the statute. It was the object of the statute to protect the Indian, a person who had been so often cheated and defrauded of valuable property by the ingenuity and skill of the settler, the white man. It was also the object of the Government to induce the Indians to resign their tribal relations, to become civilized, and for the purpose of bringing them to this status, this law was passed. Chapter 131, Laws of Congress of 1875, Secs. 15 and 16.

The Government for this purpose then gave this bounty to the Indian. It first permitted him to acquire a homestead like any other citizen. This necessitated his living upon the land under the Homestead Act for the necessary period; well knowing the cupidity of the white man and the ignorance of the Indian, especially in regard to land values, another protection was then put about the Indian. It was enacted that only could this land not be sold by virtue of any judgment or decree, but that it could not be transferred by voluntary alienation for a period of five years *from the date* of the patent issued therefor. The voluntary or involuntary alienation of the

land was alike prohibited and for the same length of time.

It seems to us that the answer to the whole question is right here: supposing someone had gained a judgment against the Indian and attempted to sell the land on the 15th day of June, 1885, would it have been a valid sale, and would the purchasar at that sale on that day have acquired a title? When one reflects on the character of the Indian and the object of the law, the only answer it seems to us would be, that no sale could take place on that day. It follows, as a matter of course, that if it could not be sold by judicial process on the 15th of June, 1885, it could not be sold by voluntary deed, as the two are coupled together in such a way that whatever reasoning applies to one must apply to the other. Any rule than the one we contend for brings difficulties in the way that never were anticipated by the law. Supposing two or three deeds had been given on the 15th day of June, 1885, then the hour of the day on which the patent issued would become a material circumstance in the case. If the patent was issued at 12 M., the deeds given in the forenoon would be invalid, and those in the afternoon valid. We think the true rule is laid down in Sheets *vs.* Sheldons lessee, 2 Wallace, 190: "*In the "interpretation of a statute when an act is to be per- "formed within a specified period from or after a day "named the general current of modern authorities as "to the computation to time is to exclude the day thus "designated and include the last day of the specified "period.*"

Again this Court in Best vs. Polk, 18 Wallace, 119, announced the rule that "An officer commissioned to hold office during the term of four years from the 2nd of March, 1845, is an officer on the 2nd

of March, 1849." The word "from" always excludes the day or date.

We invoke especially the rule we have stated as being within the express rule of interpretation as applied to Indians by this Court, although in the cases we cite it was in behalf of a tribe in interpreting a treaty. The Kansas Indians, 5 Wallace, 737. This Court announced that "Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them." Hence, a provision in an Indian treaty, which exempts their homes from levy, sale and forfeiture is not in the absence of expressions so to limit it to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also for non-payment of taxes."

In the case at bar the three parties, Young, Brown and Bidwell, can none of them claim any indulgence from the Court. Indeed if anyone could claim indulgence it would be the appellant, Bidwell, for the witness, Brown, testified on page 79, folio 125, that "We knew Young was going to get another deed if he could before the other parties got one. * * * Mr. Young and I talked it over, and so did Bidwell and me. We had a positive agreement that it should go to George Smith, and he should deed it to the several parties (Young, Brown and Bidwell), he was to deed the land that each one claimed to him. We wanted to get it just as soon as the five years had expired, but they had kept him hid."

From this it appears that Young, Brown, and Bidwell were to get a deed for this land and have their several interests, viz: Young, 40 acres; Brown, 80 acres, and Bidwell, 40 acres, conveyed to them; but instead of that Young and Brown got a deed of the

entire property, which is made to Young, acknowledged before Brown and in which Brown entirely acquiesced. If any of these parties or all of them had been in possession of the land and made improvements on their different portions before the time came when they could get a conveyance, if anyone is entitled to sympathy it certainly seems to be the appellant, Bidwell, whom these parties were attempting to wrong, but we do not think that question can really cut any figure in the case, for if the deed to Young on the 15th day of June, 1885, was after the five years expired, then the appellants have no standing in Court, but if it was within the five years, then we claim that it was absolutely void, as the alienation was positively prohibited by the sovereign power, and no interest either legal or equitable, present or expected, passed.

For the purpose of further showing the policy of the government in its treating with the Indians we cite the Court to

Smith vs. Stevens, 10 Wallace, 321.
s. c., 2 Kan., 238.
Clark vs. Libby, 14 Kan. 435.
Clark vs. Akers, 16 Kan., 165.
Farrington vs. Wilson, 29 Wis., 383.
The St. Regis Indians vs. Drum, 19 Johnson, 127.
Jackson vs. Goodell, 20 Johnson, 188.
Jackson vs. Goodell, 20 Johnson, 693.
Lee vs. Glover, 8 Cowen, 189.

Congress has passed laws regulating certain procedures in the departments of the Government, and in those laws questions of the computation of time have arisen which have we might say invariably been construed in the manner we claim. It has always been held by the commissioners of the general land office

or at least by the different local land offices, that to constitute an abandonment of a homestead in computing the six months the first day should be excluded.

The bankrupt act was construed in Dutcher *vs.* Wright, 94 U. S. 553, and there the rule we claim was enforced under the statute by excluding the day the petition was filed. The time run backward instead of forward, and the computation was necessarily backward. Nearly every state has passed some law in regard to the computation of time, and invariably it has been that the first day was to be excluded and the last day included where lands were sold for taxes, and the statute provided that the owner or occupant of any lands sold for taxes or any other person may redeem the same at any time within two years after the day of sale, etc., and that if no person shall redeem such land within two years, *at any time after the expiration thereof* and on production of the certificate of purchase the treasurer, etc., shall execute a conveyance. It was held that where the sale was made on the 15th of June, 1874, the time for redemption did not expire until the last minute of the 15th of June, 1876.

McGavock vs. Pollock, 14 N. W. Rep. (Neb.), page 659.

In the case of the People *vs.* Hatch and the People vs. Dubois, 33 Ill., page 9-138, that Court held that "in the computation of time for a bill to remain in the governor's hand unsigned before it became a law (ten days), that the correct method of computing it is, where an act is to be performed within a particular time after a specified day, that the specified day is to be excluded and the day on which the act is to be performed included."

To the same effect is:

Ewing vs. Bailey, 4 Scammon, 420.
Varien vs. Edmoston, 5 Gilman, 270.
Waterman vs. Hall, et al., 28 Ill., 55.
Dollard vs. Krise, 10 S. E. 43.
Doyle vs. Misner, 41 Mich. 549.
Coe vs. R. R. Co., 27 Minn. 197.
Francoviz vs. Smith, 34 Minn 403.
Spencer vs. Haug, 47 N. W. 794; 3 Denio 16; 1 Pick. 485; 2 Cowen, 518; 2 Cowen. 605; 6 Cowen, 659; 9 Wendell, 346; 9 Mich., 154; 6 Mich., 298; 8 Kan., 677; 45 N. H., 39; 24 Kan., 478; 15 Kan., 164; 19 Kan., 221; 16 Iowa, 588; 28 Barber, 284; 4 Howard's Prac. 298; 75 N. Y., 240; 2 Hill, 356; 2 Denio, 164; 10 Barber, 117; 5 Wendell, 137; 10 Wendell, 424; 4 Wash. C. C., 232; 1 Cal., 254; 25 Cal., 122; 25 Mich., 1; 44 N. W. 428; 67 Wis., 154.

Each one of these cases holds squarely that in the computation of time the first day is to be excluded and the last included.

Perhaps the rule has not been more concisely stated than by Mr. Justice Miller in Marvin vs. Marvin, 75 N. Y., 240, *supra*. He says: "The revised Code declares that judgment x x x upon the decision of the Court x x x may be entered by the clerk as directed therein *after the expiration* of four days from the time of the decision." The language of this enactment is very explicit that four days must expire after the decision is filed. No other construction can give full force and effect to the statute or carry out its purpose. The rule of interpretation which, in computing time, excludes the first and includes the last day, has no application to a provision which is as clear and explicit as the one cited, and can only be invoked where the act is to be done

within a certain number of days or a specified period of time. When the statute says *after* the expiration of a time named, that time must fully expire."

In the interpretation of the statute in the case at bar does not the same rule apply? Must not the time fully and clearly elapse before the right to alienate the property voluntarily, or the time to alienate it by judicial process begins to operate? How can anyone state confidently and surely that the time has elapsed unless this rule is invoked? The patent may have issued at nine o'clock in the morning, it may have issued at twelve o'clock at night. In the latter case the five years would not have elapsed until twelve o'clock midnight had taken place on the 15th of June, 1885. No certain and sure rule within the statute for the protection of the person whom it was intended to protect, viz., the Indian, can be in force without interpreting it as we claim. Hours, minutes and even seconds might cut important figures in litigation in reference to these lands if the other rule held.

Many of the Indians have taked these lands and renounced their tribal relations; many more will take them as the reservations are opened and as the efforts of the Government to civilize them become more successful. These laws restraining alienations are not made for the benefit of the vigilant, active, grasping speculator, who with his watch in hand, calculates the minute when he may get the Indian's land, but they are made for the benefit of the Indian himself, and should be liberally interpreted for that purpose, so that the full time may certainly elapse that the Government has considered necessary for his protection.

There are two or three cases which the respondents

rely upon decided by this Court, viz: Arnold *vs.* The United States, 9 Cranch 119; Griffith vs. Bogart and 18 Howard 158, and one case in Pennsylvania, Lysle *vs.* Williams, 15 Sargent and Rawle 135.

We take the last case first. The Court says (in holding that the first day should be included and not the last): "That the reason of the rule is that when words of equivalent meaning are made use of and there is no index from which the intention of the party who used them may be gathered, the construction shall be made most advantageously for him in whose favor the instrument is made." That case was upon the construction of a bond payable in five years from the date. This is on the construction of a statute made for the protection of the Indian. If the same reasoning applies in this case as applied in that, then that case can be entirely reconciled with the rule we claim, for the reason as before stated, that the statute having been passed for the protection and benefit and being for the protection and necessarily for the benefit of the Indian in prohibiting an alienation voluntarily or involuntarily of the property for the period of five years from the date of the patent, it should be construed liberally in connection with the purpose for which it was passed.

Arnold *vs.* The United States was upon a bond given for the payment of duty on the 2nd day of July 1812, and the question arose whether the goods were liable for the duties imposed by the act of July 1st, 1812. The act provided for an additional duty *from and after the passage of the act.* Both words "from" and "after" were used. The point from whence the law took effect was not a date but an act, that was the passage of the law, and to make it absolutely certain that there could be no question of the

instant when the law took effect, both the words "from" and "after" were used and the act of the passage of the law made the point of departure. In the case at bar the words are, not from the time of the issue of the patent, but from the *date* of the issue of the patent.

In the other case, Griffith vs. Bogart, the Court says, on page 164, after discussing the question of the "*terminus a quo*:" "But if the correct application of the rules of the present courts were doubtful, the fact that this question was raised and decided by the Court between the parties to the judgment, and that the Court after considering the question ordered the sale to be made on the 1st of May, would be conclusive, not only as *Res judicata inter parties*, but as evidence of the *received construction by the Courts of Missouri* which it would be not best of judicial discretion now to overturn. Finally there is another view of the case, which is conclusive as regards this and all other objections taken by the counsel to the validity of the sheriff's deed. It is the well known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a Court of competent jurisdiction cannot be questioned collaterally except in the case of fraud in which the purchaser was a participant."

So that we come to the conclusion that it is not the established rule of this Court that the first day shall be included and the last excluded in computing time under a statute or under a contract. But that on the contrary the trend of the latter decisions of the Court is towards the rule which we have invoked, and not only does the weight of judicial decision but the entire current of legislation, both by Congress and the states, show that this provoking question is

being settled throughout the Union, at least in the minds of the different legislative bodies, by passing laws which without exception, as we believe, exclude the first day and include the last. Beleiving that the Supreme Court of Dakota Territory erred in their judgment in this case, this brief is respectfully submitted.

C. H. WINSOR,
Attorney for Appellants.

147,666

JAN 4 1893
JAMES H. McKENNEY,
CLERK.

CASE Number 13,666.

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1892

TERM No. 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS

vs.

ALFRED BROWN AND TIMOTHY YOUNG,
RESPONDENTS.

RESPONDENT'S BRIEF.

ROBERT J. GAMBLE,
Attorney for Respondents.

TIMES-DISPATCH PRINT, 1107 E. 66, SOUTH DAKOTA.

CASE Number 13,666.

SUPREME COURT of the UNITED STATES

OCTOBER TERM. 1892

TERM NO. 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS

vs.

ALFRED BROWN AND TIMOTHY YOUNG,
RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

RESPONDENT'S BRIEF.

STATEMENT.

This is an action brought by the plaintiffs against the defendants Young, Brown and others, alleging certain conveyances to be void, and clouds on plaintiffs title and asking that such conveyances be adjudged clouds and decreed null and void by the court. 1

The defendants Young and Brown are the only parties served, and judgment only was taken against them in accordance with the prayer of the amended complaint. The defendants, Young and Brown, separately answered. After the trial they separately requested findings in their favor, and the court found separately as to each defendant, and each moved for a new trial, which motions being overruled and judgment being entered against them, they separately appealed to the supreme court of the then Territory of Dakota. 2

The plaintiffs, by their amended complaint, allege that Thomas K. West became the owner of the one hundred and sixty acres of land described in the pleadings, on the 15th of June, 1880; that said West was an Indian, and had abandoned his tribal relations, and had made satisfactory proof in accordance with the rules prescribed by the secretary of the
3 interior; and that the land was taken as a homestead, under the laws of the United States, and proved up on as such by said West. That on the 17th of June, 1885, said West granted the land to one Thayer, and on June 19, 1885 said Thayer granted the land to the plaintiffs. That said Young, on the 15th of June, 1885, received a pretended deed of the land from West. That on the 15th day of August, 1881, said Brown received a pretended deed from Sophia Weston, who was the same person as Sophia West, and that she had, on the 13th day of August, 1881, received a pretended deed of the land from Thomas K. West. And alleging that each of said deeds of
4 Thomas K. West, except the one to Thayer, are void, for the reason that said land was not subject to alienation or incumbrance in any manner, until after June 15, 1885.

The defendant, YOUNG, in his answer, after his denial, alleges that the deed from West to Thayer was obtained in fraud of Young's rights, without consideration and with full notice of Young's rights in the premises; and the deed by Thayer to plaintiffs was made in furtherance of the same design and without consideration. And as a separate defense the answer alleges that the patent was issued to said West, June 15, 1880, and pleads the same by copy (Record, page 17.) This patent, is absolute on its
5 face, the same as is made to all white citizens entering land under the homestead laws of the United States and containing only the usual limitation as to accrued water and mining rights. And alleging that said West on the 26th of August, 1879, duly entered said land under the homestead laws of the United States and received his final Receiver's receipt therefor on that day; and that the

Register duly issued his final certificate of such homestead entry, setting up the giving of the pretended deeds by West to Thayer, and by Thayer to the plaintiffs, and that West, prior to making said deed 6
to Thayer, had on the 15th day of January, 1881, conveyed the 40 acres described, to Young, and that on the 15th of June, 1885, said West and wife duly conveyed all of said land to Young by good and sufficient deed, both of which deeds to Young, were duly recorded prior to said deed by West and wife to Thayer, and that said West had no interest or title to said land to convey to Thayer, and Thayer had had none to convey to plaintiffs. And as a third defense said Young alleges adverse possession by him, and that the deed by West to Thayer, and Thayer to plaintiffs are void for that reason.

And as a counter-claim Young alleges the same facts as stated in his second defense, and that he is 7
the owner of the 40 acres by his first deed from West, and of the whole 160 acres by his second deed from West. He sets up adverse possession in him as above stated, and that said West had no title to convey to Thayer. That the land was the property of Young. That the deed of West to Thayer and by Thayer to plaintiffs are void and clouds on his title, and he also sets up in his counter claim, permanent improvements in good faith, to the extent of $4,000 and the value of the land aside from the improvements is $3,000, with the usual prayer for relief, that plaintiffs claims be quieted and Young be declared the owner of the land, &c.

The defendant, ~~and~~ Alfred Brown, separately 8
answered said amended complaint; which answer and counter-claim are the same as Young's in substance, except that he makes no reference to a claim under the deeds to Young; and claims the south 80 acres situated in section 13, described in his answer, under different deeds. The first from Thomas K. West to Sophia Weston, executed August 13, 1881, and from Sophia Weston to Brown, executed August 15, 1881. That Sophia West and Sophia Weston was the same person. Which deeds were duly recorded prior to the making of said deeds from West to

9 Thayer, and from Thayer to plaintiffs, that said last named deeds to Thayer and plaintiffs, were void. That he, Brown, was the sole owner of said 80 acres, setting up also adverse possession against the plaintiffs, West and Thayer, and asking that he be decreed the owner of said 80 acres and relief against the plaintiffs, &c.

The plaintiffs replied to the counter-claims of said Young and Brown admitting that Thomas K. West became the owner of the land as set out in paragraph 1 of the 2nd defense of defendants, which paragraph sets up the issue of said patent to West, dated June 15, 1880, marked exhibit "A" attached to
10 said answers, (*Record, page 12*); that he made his final proof August 26, 1879, and the final Receiver's receipt was issued and delivered to him on that day marked exhibit "B" (*Record, page 8*), which receipt recites that the money received was for the entry under section 2291 *of* the Revised Statutes of the United States; and that the Register of the land office on the same day duly issued his final certificate of said homestead entry to said West marked exhibit "C," (*Record, page 13*), which certificate states that pursuant to said section 2291, said West has made payment in full for said land and that on presentation of said certificate to the commissioner of the general land office said West shall be entitled to a
11 patent for the land.

The other material allegations of said replies are certain denials, and the same allegations as in the complaint as to West being an Indian; that the plaintiffs are the owners under their said deeds from West to Thayer and Thayer to plaintiffs; that the said deeds to Young and Brown are void and conveyed no title or color of title with the prayer for relief.

Upon the admissions in the pleadings and the issues thus formed, the cause was tried before the court and the plaintiffs offered in evidence the record from General Land office of the application and the final proof papers of West (*Record pages 60—66*);
12 which was received under the separate objections of defendants (*Record page* 66,) the grounds of which objection are fully stated hereafter in the brief. The

United States patent was thereupon read in evidence without objection. The patent appears in defendant's answer, (*Record Page 12.*) and in findings of fact by the Judge, (*Record page 17.*) The plaintiff thereupon read in evidence the deed mentioned in the pleadings, from West and wife to Thayer, dated June 17, 1885, and recorded on that day marked exhibit "C." (*Record page 68.*) This is a mere quit claim deed from West for only $20 consideration for the 13
whole 160 acres, claimed by the defendants to be worth over $8,000, and the 40 acres claimed by Young under his first deed was found by the court to be worth $4,000. Just two days later, June 19, 1885, the said Thayer, a resident of Jerauld county, South Dakota by another quit-claim deed marked exhibit "D." (*Record page 69.*) for the alleged consideration of $500, but without proof of any payment being made, sold the same land to these plaintiffs. The plaintiff thereupon offered proof tending to show that Thomas K. West was a Sioux Indian, under separate objections by the defendants (*Record Pages 14*
70-71); which objections are hereinafter stated (see also statement of said objections, *page 70 Record*) and without offering further proof rested.

The defendant Young to maintain the issues on his part offered and read in evidence exhibit "E." a full warranty deed of the 40 acres to him from said West dated January 25, 1881, and duly recorded on the same day, for the consideration expressed and actually paid of $275. (*Record page 140*) and also a quit claim deed marked exhibit "F" of the whole 160 acres from West to him, June 15, 1885, and recorded on that day for the consideration expressed and actually paid of $900. And the court finds the 15
making of the above deeds and the consideration paid therefor as above stated. *See finding II, pages 24-25, Record, and finding 5 pages 26-27, Record,* where both deeds are set out in full. The said Young introduced evidence showing among other things that he had occupied and resided on the 40 acres described in his first deed of January 25, 1881, exclusively ever since that date; that long prior to the deed to Thayer he had built a residence on the same, worth

$1,500, that he had built a barn, sheds, corn-cribs, out houses, and fences, planted trees and broken and
16 cultivated the same and made permanent improvements on the 40 acres worth $2,500 and upwards, aside from the value of the land worth $2,000; that he received said deed and occupied the said land under said deed and put the improvements thereon in good faith, and held the whole of said 40 adversely against said West, Thayer and the plaintiffs during the whole of that time and including the date of the delivery of said deeds from West to Thayer and from Thayer to plaintiffs, and plaintiffs on the trial admitted such adverse possession. And the court so found and placed the value of the improvements at $2,000. (*See finding III and IV by the Court page 26 Records.*)

17 And the court also found that on the 15th day of June, 1885, the defendant, Young, entered into actual possession of the whole of said 160 under his said deed of that date from West, and occupied, possessed and claimed the same adversely to said West, Thayer and the plaintiffs (*See finding V, pages 26, 27, Record.*)

And the court also found that said West was not in the possession of said land at the time of the delivery of his deed to Thayer; *finding VI, page 28 Record*); and that Thayer was not in possession of the land at the time of the delivery of his deed to the plaintiff. (*See finding VII, same page*). And that the plaintiffs were not in possession of any of the 160
18 acres since and long prior to June 15, 1885. (*See finding VIII on same page.*)

The following findings of the court are against Young and exceptions duly taken: (*pages 30, 31, Record.*)

9. That West was a Sioux Indian and was entitled under sections 15 and 16 of the act of congress, passed March 3, 1875, to enter a homestead under the laws of the United States, and had entered said land under said laws and proved up on the same and received said patent.

11. That on the 19th of June, 1885, Thayer executed and delivered to plaintiffs a deed for the prem-
19 ises described in the patent.

12. That all the deeds to Brown, Sophia West and Young were made within five years from the date of the patent.

13. That the adverse possession of Young and Brown is entirely founded on conveyances that are absolutely null and void.

14. That the possession of Brown and Young and the improvements made thereon by them, were made with full notice that West was an Indian.

It clearly appears that finding 9 is partly a conclusion of law, and that finding 13 is a conclusion of 20
law and unwarranted by the facts in the case.

And it is important to notice here, that the findings of the trial court against Young and Brown are fatally defective in this: It no where affirmatively finds that the title of West, the patentee, ever passed by deed to Thayer, the grantor of the plaintiffs; and hence, even for that reason alone, the second conclusion of law declaring said deed valid, &c., is not warranted by the facts found.

And it is also important to notice, that if plaintiffs' view of the law is correct; that is the fact that West was an Indian renders void the deeds of West to Young and Brown; such could only be the case, 21
upon the theory that they had notice of such fact at the time they took said deeds. The plaintiffs tried the case on the theory, that notice was material, and secured a finding of that fact. Now, if such notice was material, it should have been plead, and as neither the complaint nor replies contain an allegation of such notice, plaintiffs pleadings are fatally defective; and such defect can be taken advantage of here, and the judgment for that reason alone should have been reversed in the appellent court.

And another fatal defect which should bar plaintiffs right of recovery in this action appears on the face of the record: The action is to remove a cloud 22
from plaintiffs title. This action lies when plaintiff is in possession and he seeks the aid of a court of equity. But the findings show defendants in possession and plaintiffs out of possession. The plaintiffs have mistaken their remedy. They ought to have

brought an action to recover possession and asked the proper relief in such action under the Statute.

The eight findings of fact requested by the defendant Young, and the first eight corresponding findings by the court, clearly entitle the defendant,
23 Young, to judgment and he therefore requested the Supreme court of the then Territory to find as prayed for by Young and direct judgment to be entered accordingly.

The defendant Brown on the trial of the cause offered and read in evidence, Exhibit "G," a deed with full covenants of warranty executed August 13, 1881, from said Thomas K. West to Sophia West, in the name of Sophia Weston, for the south 80 acres of said land, being the north half of the northeast ¼ of section 15, (*Record page 76*), which deed appears in full in the findings of fact against Brown (*see finding 11, page 46, R. Record*), and also a full warranty deed in due
24 form from Sophia West to said Brown, dated August 15, 1881, of the same property (*see III, finding, 50 ¶1 Record*), both of which deeds were duly recorded: the first, October 7, 1881, and the second August 17, 1881. And the defendant Brown introduced evidence tending to show that he took possession of the 80 acres immediately after the delivery of the deed on August 15, 1881, and had been in possession ever since; that he broke some the next season; he broke about thirty acres in all, and cropped it ever since and cut grass on the rest of it. That the 80 acres was worth at the time of the trial $5,400; that West and wife were not in possession of any of the 160 acres June 17, 1881, and Thayer never was in pos-
25 session of a foot of it, nor was either of the plaintiffs (*page 78 Record.*)

The defendant, Brown, made the same requests as Young, except that the findings referred to said 80 acres, and the making of the two deeds from West to his wife, and from her to Brown; and as to her name being Weston, (*pages 31, 36*); and the court made all these findings of fact so far as was material to the right of Brown to recover judgment in his favor as prayed for by him; but refused to find the conclusions of law and to enter judgment in his favor

as requested, and made the same findings of fact and conclusions of law against Brown as against Young. 26
And the said Brown renewed his said requests to the Supreme Court of the then Territory, and asked that judgment be entered in his favor.

Before examining the law, as applied to the case, it is proper to state, that the defendant Brown instructed his counsel in the Supreme Court of the Territory to present his case to that court on the admitted fact that he claimed his title to the 80 acres through the two warranty deeds, the first from Thomas K West, the patentee, to his wife Sophia, and from her to Brown, which are within five years from the date of the patent.

First : Because the patent was absolute on its face 27
and conveyed fee simple title to West without any limitation of the power of alienation, as stated in the Brief on that point, and he joins in that part of the Brief.

Second: That the deeds from West to Thayer and from Thayer to plaintiffs are void as to said 80 acres, because of the adverse possession of Brown as against them. The question as to such possession being adverse to Young or not, is immaterial as regards the plaintiffs, under any feature of the case, and need not be considered. *Hamilton v. Wright 37, N. Y., 502.*

But if the Supreme Court of the Territory found 28
as a matter of law that the first deed to Young and the two deeds under which he, Brown, claimed were void; for the reasons claimed by plaintiffs, as being within the five years, and that the second deed to the whole land from West to Young, dated June 15, 1885, was valid because the five years had elapsed, he was content with that conclusion and consented that judgment for the whole land be directed to be entered as prayed for by Young.

The cause was heard before the Supreme Court of the Territory on the 25th day of May, 1888, and the judgment of the lower court was reversed and the action remanded to the district court with in- 29
structions to dismiss the complaint and to enter judgment in accordance with the opinion of the Supreme

Court. On the 2nd day of October, 1888, an appeal to this court was allowed by the Supreme Court of the Territory, and on the 8th day of February, 1889, an order was entered by said court allowing the appellants to complete their appeal to this court by filing a bond as of the date of the allowance of the appeal. *(Record pages 156-7.)*

30

BRIEF.

In presenting the questions involved in this case, they may properly be sub-divided under the following heads:

I. Admitting for the purposes of this argument that the statute of March 3, 1875, entered into and limited the absolute grant of the United States patent to West, the time specified in the statute had elapsed on June 15, 1885, the date of the deed to the defendant Young.

31 II. The United States patent to West being absolute on its face, without any limitations or restrictions of the power of alienation or otherwise, purchasers from him under the patent would take the title conveyed in the patent by the government, unaffected by the limitations of the statute.

III. Conceding that the conditions of the statute might have been embodied into, and limited, the terms of the absolute grant under the patent, yet it having been issued by the government without this limitation, it is not competent for third parties to raise this question, where the government, the grantor, makes no complaint, and the patent remains in full force.

IV. The deeds from West and wife to Thayer,
32 and from Thayer and wife to plaintiffs, are void under section 681 of the Civil Code of South Dakota because at the time of delivery of such deeds, the real property was in the actual possession of defendants, claiming title adversely to each grantor.

1.

AS TO THE EXPIRATION OF THE LIMITATION OF THE STATUTE.

The proviso, or limiting clause of the statute of March 3, 1875, is as follows: "Provided, however, 36
that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent therefor."

18 U. S. Statutes at Large, 420.
Sup. to Rev. Stat. 167.

Under this head, the question of inquiry is, had not West, the grantee in the patent, been under the disabilities of the statute for the time mentioned before the execution of the deed of June 15, 1885, to Young? If it be claimed, as it is, that West was af- 37
fected by the disabilities of the statute, outside of the terms of the patent itself, it would certainly follow that he was affected by its terms and the limitation operated, on the 15th day of June, 1880, the date of the issue of the patent to him. The title vested in him by the execution and record of the patent, by the department of the government clothed with that jurisdiction, and it was not necessary that there should be any delivery to him.

United States v. Schurz, 103 U. S., 378.

If then, the limitations of the statute prevail over the absolute recitals of the grant itself and the instrument by which the title was conveyed to him, 38
then West could not have executed a legal transfer of the property, upon that date, the date of the issue of the patent to him, June 15, 1880.

It is an admitted rule of computation, and so regulated by the statute, that, "Fractions of a day "are to be disregarded in computations, which in- "clude more than one day, and involve no questions "of priority."

Civil Code of South Dakota, Sec. 2123.

West then must have been affected by the limitation of the statute for the whole of the day of June 15, 1880. In other words, the limitation and disabil-
39 ity commenced to operate at the first minute of time of June 15, 1880. That is, at the point of time at the expiration of the last minute of time of June 14, 1880. If this be true, then the grantee West, was affected by the limitation, and his disability commenced at the point of time upon the expiration of the last minute of time of June 14, 1880, and at the commencement of the first minute of time of June 15, 1880. The first year of the limitation would then expire at the last minute of time of June 14, 1881, and the second year commence at the first minute of time of June 15, 1881, and so on, and the fifth year would expire at the expiration of the last minute of time of June 14th, 1885. And the first minute of time of June 15, 1885, would be the commencement of the sixth
24 year, and hence, outside of the limitation.

The statute must have contemplated the grant and limitation to take their inception from the same moment of time. But if the contention of appellants is correct, the statute must be construed as intending the limitation to commence upon the day succeeding the grant, and in such case, a period of time would intervene in which the limitation would not be operative, and a conveyance could be made by the grantee which would nullify the benefit intended to follow from the restriction imposed.

There is no rule of computation laid down by the Civil Code of the state to guide us absolutely in a
25 case of this character. The only suggestion that we can gain from it is in the case of minors completing the period of minority, and in that case, it follows the rule above indicated.

Minors are: 1. Males under 21 years of age. 2. Females under 18 years of age. The periods thus specified must be calculated from the first minute of the day on which persons are born, to the same minute of the corresponding day completing the period of minority.

Civil Code of South Dakota, Sec. 10

Aside from the above, there is no other guide indicated as to computation. It defines "year" in section 2123, Civil Code, and states that it means a "calendar year." 42

As to matters of civil procedure, our own Code follows the rule as laid down by some of the states in this particular.

"The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last is a holiday, and then it is also excluded."

Code Civil Procedure South Dakota Sec. 6.

But we do not apprehend it will be claimed that the rule of computation fixed by statute for civil procedure would be authoritative or a guide as determining matters affecting the rights of property or persons outside of those matters regulated and em- 43
braced in the Code of Civil Procedure. The Code into which this provision is engrafted expressly provides, in Section 3, that "It establishes the law of the territory respecting the subjects to which it relates." As the Code provides as to subjects of procedure, it would follow that this method of computation would apply to this subject alone, and not to matters outside of the subject to which the Code of Civil Procedure relates. This is the view taken by California, where she separately embodies the provision as to the method of computation of time in each of her Codes. The provision is identical with Sec. 6, *supra* of the Code of Civil Procedure of this State. 44

Political Code of California, Deering, Vol. 1, Sec. 12.
Civil Code of California, Deering, Vol. 2, Sec. 10.
Code of Civil Procedure, California, Deering, Vol. 3, Sec. 12.

The leading case in the English courts is *Pugh vs. Duke of Leeds*, decided by Lord Mansfield in 1777, which has remained as the proper exposition of this question and has been followed by their courts till the present time. The case arose on the validity of a lease and the power reserved in a marriage settlement to one Edwards to make leases, with many restrictions and qualifications, and among the rest the

45 following: "That they were not to be in reversion, remainder or expectancy," and therefore the question is "whether this be a lease in possession?" and it turns upon this: "Whether to commence *from the day of the date* in this deed, is to be construed *inclusive* or *exclusive* of the day it bears date?" After this statement he proceeds as follows:

"I will first consider it as supposing this a *new* question; and that there never had existed any litigation concerning it. In that light, the whole will turn upon a point of construction of the particle "*from.*" The power requires no precise form to describe the commencement of the lease; the law re-
46 quires no *technical* form. All that is required is only enough to show that it is a lease in possession, and not in reversion; and, therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease.

"In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word "*from*" must always *depend* upon the *context* and *subject matter* whether it be construed *inclusive* or *exclusive* of the *terminus a quo*; and whilst the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both in-
47 clusively and exclusively. If the parties in the present case had added the word "inclusive," or "exclusive," the matter would have been very clear. If they had said "from the day of the date "*inclusive*," the term would have commenced immediately; if they had said "from the day of date "*exclusive*," it would have commenced the next day.

"But let us see whether the context and subject matter in this case, do not show that the construction here should be *inclusive*, as demonstrably as if the word "inclusive" had been added.

"This is a lease made under a power; the lease refers to the power; and the power requires that the lease should be a lease *in possession*. The validity of
48 it depends upon its being in possession; and it is made as a provision for an only daughter. He must, therefore, *intend* to make a *good* lease. The expres-

sion, then, compared with the circumstances, is as strong in respect of what his intention was, as if he had said in express words, "I mean it as a lease in possession." "I mean it shall be so construed." If it *is* so construed, the word "*from*" must be *inclusive*. This construction is to support the deeds of parties, to give effect to their intention, and to protect property. The other is a subtlety to overturn property and to defeat the intention of parties without answering any one good end or purpose whatsoever. And though courts of justice are sometimes obliged to 49
decide against the convenience, and even against the seeming right of *private* persons, yet it is always in favor of some greater *public* benefit. But here, to construe "from the day of the date" to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney, or his clerk. Therefore, if the case stood clear of every question or decision, which has existed, it could not bear a moment's argument."

"To conclude: the ground of the opinion and 50
judgment which I now deliver, is, that "*from*" may in vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*; that the parties necessarily understood and used it in that sense which made their deed effectual; that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of their meaning."

Pugh v. Duke of Leeds, 2 Cowper, 714.

And the same court has since followed the rule laid down in the above case, in *Glassington v. Rawlins, 3 East, 407*, in which it was held that where time was 51
to be computed from an act done, the day on which said act is done is to be included in the computation. And that where a statute provided that a trader lying in prison two months after an arrest for debt, should

be adjudged a bankrupt, in the computation of such time the day of the arrest should be included.

This question first arose in this Court in 1815, in case of *Arnold vs. The United States*, 3 *Cranch*, 119. The action was upon a bond given for the payment of duties on the 2d day of July, 1812, and the question arose whether the goods were liable for the duties imposed by the act of July 1, 1812.

This act provided for an additional duty of 100
52 per cent upon goods imported into the United States *from and after the passage of this act*. Upon this state of facts, the court, speaking by Judge Story, say:

"It is contended that this statute did not take "effect until the second day of July; nor, indeed un- "til it was formally promulgated and published. We "cannot yield assent to this construction. The "statute was to take effect from its passage; and it is "a general rule that where the computation is to be "made from an act done, the day on which the act is "done is to be included."

The above rule seems never to have been ques-
53 tioned, or to have been before that court until 1855. It came up from the State of Missouri in the case of *Guppert vs. Bogart*, 18 *How*, 158, for the cancellation of a sheriff's deed. It arose upon a statute which provided for the sale of deceased debtors' property, but that the same should not be seized or sold until after the expiration of eighteen months from the death of such ancestor, or the date of the letters testamentary, or of administration. Letters of administration were dated November 1, 1819. The sale was made by the sheriff on May 1, 1821, on executions previously issued. Upon this state of facts the court says:

"It is contended that the term of eighteen months
54 from the 1st of November, 1819, had not expired on the first of May, 1821, and consequently the sale was without authority of law, and void. "But we are of opinion that the assumption on which this inference is based is not correct; nor the inference correct, if the assumption were granted.

"If the day on which the letters of administra-

tion be counted, in the calculation, the term of eighteen months had "expired" on the first of May, 1821.

"Whether the *terminus a quo* should be so included, it must be admitted, has been a vexed question 55
for many centuries, both among learned doctors of the civil law, and the courts of England and this country. It has been termed by a writer on civil law (Tiraqueau) the *controversio controversissima*.

"In common and popular usage, the day *a quo* has always been included, and such has been the general rule, both of the Roman and common law. The latter admits no fractions of a day; the former, in some instances, as in cases of minority, calculated *de momento en momentum*. The result of this subdivision was to comprehend a part of the *terminus a quo*. But in cases where fractions of a day were not 56
admitted, as in those of usucupation or prescription, a possession commencing on the first of January and ending on the 31st of December, was counted a full year. It was in consequence of the uncertainty introduced on this subject by the disquisitions and disputes of learned professors, that Gregory IX., in his decretals, introduced the phrase of "a year and a day," in order to remove the doubts thus created, as to whether *dies a quo* should be included in the terms. It thus maintained the correctness of the common usage, while it satisfied the doubts of the doctors.

"The earlier cases at common law show the 57
adoption of the popular usage as the general rule, but many exceptions were introduced in its application to leases, limitations, &c., where a forfeiture would ensue. But the cases are conflicting and have established no fixed rule as to such exceptions. Lord Mansfield reviews the cases before his time, in *Pugh vs Leeds, Cowp.*, 714, and comes to the conclusion 'that the cases for two hundred years had only served to embarass a point which a plain man of common sense and understanding would have no difficulty in construing."

"The rule that he lays down in that case is 'that courts of justice ought to construe the words of par-

58 ties so as to effectuate their deeds and not destroy them; and that *from the date* may, in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive."

"It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any *bona fide* transaction or title. The intention and policy of the enactment should be sought for and carried out. Courts should never
59 indulge in nice grammatical criticism of prepositions or conjunctions, in order to destroy rights honestly acquired.

"In the present case there is no reason for departing from the general rule and popular usage of treating the day from which the term is to be calculated, or *terminus a quo*, as inclusive. The object of the legislature was to give a stay of execution for eighteen months in order that the administrator might have an opportunity of collecting the assets of the deceased and applying them to the discharge of his debts. The day on which the letters issue may be used for this purpose as effectually as any
60 other in the year. The rights of the creditors to execution are restrained by the act for the benefit of the debtor's estate. The administrator has had the number of days allowed to him by the statute to collect his assets and pay the debts. The construction which would exclude the day of the date is invoked, not to avoid a forfeiture or confirm a title, but to destroy one obtained by a purchaser in good faith under the sanction of a public judicial sale."

* * * * *

"On every view of the case we are of opinion that the title of the purchaser is protected by the established rules of law, and that there was no error in
61 the instructions given to the jury by the court below."

"The question again came before the Supreme Court in the case of *Sheets vs. Selden's Lessee*, 2 *Wall* 177, upon the question of a forfeiture of a lease,

which provided that the rents should be paid semi-annually on the first days of May and November, and if any instalment should remain unpaid *for one month from the time it should become due*, all the rights and privileges secured to the lessee should cease and determine, &c. It was held in this case that the one month from May 1, within which to pay the rent due on that day, was to be made to prevent a forfeiture, expired on June 1, following. This case is in 62
perfect harmony with the case of Griffith vs. Bogart, *supra*, in which it was held, following Lord Mansfield in the case of Duke of Leeds, that there was no absolute rule of computation, "but that courts will always prefer that construction which will confirm rather than destroy any *bona fide* transaction or title." And in that case the court adopted the construction by *including* the first day to "avoid a forfeiture and confirm a title absolute, by a purchaser in good faith under the sanction of a public judicial sale."

There is not a question raised by the court that this is not in harmony with its former decisions upon 63
this question. A simple analysis of the case shows that it is. The rent fell due May 1. The lessee would have until 12 o'clock midnight of May 1st in which to pay the rent due, or until the commencement of the first minute of time of May 2. The *month* would commence to run with the first minute of time of May 2, and would be completed with the expiration of the last minute of time of June 1, following, and at that point of time the forfeiture would be complete.

The last case before that court was that of *Dutcher v. Wright*, 94, U. S. 553. The decision in this case, as the court states, was confined exclusively to 64
the construction of the Bankrupt Act. (page 559.) That act itself provided that in computation of time under its provisions, the first day should be exclusive. *Rev. Stat. Sec. 5013.* But in the discussion of the case, the court cite with approval the former decisions of *Arnold v. United States*, 9 Cranch 119; *Griffith v. Bogart* 18, How., 158; as also the case of *Pugh v. Leeds*, Cowper, 714; so that this court has

held by a uniform line of decisions from 1815 to 1876, the view contended for by the ~~Appellants~~ Defendants in this case: "That courts of justice are to construe the words of
65 parties so as to effectuate their deeds, and not destroy them." And such a construction should be placed upon this statute "to support the deeds of parties, to give effect to their intention, and to protect property, and not by a subtlety of language overturn property, defeat the intention of parties, without answering any one good purpose whatsoever."

This question was first brought before the Supreme Court of California, before the adoption of the present Code, in the case of *Price v. Whiteman*, 8 Cal. 412, in which the court say: "The construction should be such in each case as to carry out the
66 intention of the parties, and give effect to their contracts." * * "When the entire validity of an instrument or a title must fail, and the true intention of the parties be defeated, unless the first day be included, then it should be done."

It may be that cases can be cited from this Court, holding the converse proposition, but it will be found upon examination that it was after the adoption of the Codes, and the embodying in their statute law the provisions as to computation above cited, and these decisions are but the expression of the statute.

The Supreme Court of Pennsylvania in the case of *Lysle vs. Williams, 15 Sarg. and Rowle, 135*, say:

"The only question which remains to be con-
67 sidered, under the finding of the jury, is whether the *scire facias* was issued too soon. It will be recollected, that the bond was dated the 22nd of July, 1818 payable in five years *from the date*, and that the *scire facias* was issued the 22nd of July, 1823. The determination of this question will depend upon the legal import of the words *from the date*, applied to a bond, or, in other words, whether the 22nd of July, 1818 be *inclusive* or *exclusive*.

"From a careful review of all the cases, this principle, which has an immediate application to this question, may be fairly extracted: That when the words, *from the date*, are made use of to denote the

terminus a quo, an immediate interest is to pass, the 68
date of the instrument is *inclusive*. And the reason of the rule is, that when words of an equivocal meaning are made use of, and there is no index from which the intention of the party who used them may be gathered, the construction shall be made most advantageous for him, in whose favor the instrument is made. The distinction is between the legal construction of the words, *from the date*, when used by way of *computation* and when used by way of *passing an interest*. Upon the execution of the bond, on the 22d of July, 1818, an immediate interest passed to *Lysle and Newman*; and as in law, there are no fractions of a day, they are enti- 69
tled to interest for the whole of the 22d of July, 1818. It follows that the five years had expired on the 22d day of July, 1823, and that the *scire facias* was properly issued."

The above case is strongly in point. The patent, under the strongest construction claimed by respondents passed an immediate interest to West and under this, the date should be *inclusive*.

This question was recently before the Supreme Court of Wisconsin, in *Wright vs. Forrestal 67 Wis. 341*. The matter involved was whether a resolution passed by the common council of the city of Milwaukee, had been passed conformable to the pro- 70
visions of its charter, which provided, "the resolution shall lie over at least four weeks after its introduction, and no action shall be taken by the common council, if within that time a remonstrance," &c. "shall be presented to the common council." A resolution had been introduced January 21, 1878; and adopted Feburary 18, 1878, the fourth Monday after its introduction. Upon this state of facts the court say:

"They evidently construed it, as men ordinarily would, that a week was the period of time extending from Monday of one week to Monday of the next week following, and not until Tuesday of such week, and that the resolution, if introduced on Monday, 71
had laid over four weeks when the fourth Monday thereafter had arrived, and that they were at liberty to act upon it then. This we think is the rational

construction of the act, and clearly within the intention of the legislature. We think the resolution was not prematurely acted upon."

We do not claim there is an entire uniformity of decisions in all the courts of this country upon this question, but what we do claim is, we are sustained in this view by a large majority of the best courts and text writers; and that upon an examination of
72 the cases cited as holding a converse view, it will be found they are based upon statutory construction and questions of procedure. We believe the court will find an unvarying rule throughout the whole line of decisions, in harmony with the view contended for by defendants. There is no uniform rule of construction as to whether the day shall be *inclusive* or *exclusive* and in applying the doctrine to be deduced from conflicting cases to a *quasi* forfeiture, as this is, a court of equity should lean against a construction which favors forfeiture.

Taylor vs. Mosher, 5 C. E. *Green (N. J.) 262.*

And in further supporting this doctrine, we in-
73 vite the court's attention to the following authorities:

Dwarris on Statutes, 768, 769.

Taylor's Landlord & Tenant, Sec. 78 and cases cited.

4 Kent's Commentaries, 87 and notes.

Pratt v. Brackett, 20 Kan at 200.

Anglesbarger vs. Slapp, 91 Ind., 311.

Kerr v. Hoverstok, 94 Ind., 178.

Steffins v. Anthony, 5 Cal, 348.

Faulds v. People, 66 Ill., 210.

Barton v. Abbe 16 Ohio, 408.

Arrowsmith v. Hamaring, 39 Ohio St. 573.

Jones v. Planter, 42 Am. Dec. (Tenn.) 491.

Williamson v. Farrow, 21 Am. Dec. (S. Car) 492.

Justin v. Robertson, 39 Barb. 9.

74 *Gillespie v. White*, 16 *Jons. at 120.*

Migotti v. Colville, 9 Cent. L. J. 105. English Ct. Appeals, 1879.)

Gantz v. Toles 40, Mich. 725.

Thomas v. Afflick 16 *Penn. st.* 14.

Chiles v. Smith 13, *Brown 460.*

We embody as a part of our argument covering the question as to the expiration of the limitation of

the statute, from the opinion of the Supreme Court of the Territory in this case by Mr. Justice Thomas.

We shall now consider what we deem the vital point in this case, which is the question as to the effect and validity of the deed of date the 15th of June, 75
1885, the fifth anniversary of the date of the patent. It is contended by counsel for respondents that the 15th of June, 1885, was within the period of limitation, and the deed of that date to appellant Young gave him no title to the lands by reason of this fact; that in the computation of time, when an act is to be done, it is a well settled rule that the first day is to be excluded, and in apparent support of this proposition cites numerous authorities. It is clear, if this proposition is correct, the deed of that date is invalid; but we cannot agree with counsel for respondents that the rule, as he states it, is well settled, but, on the contrary, the question whether the *terminus a* 76
quo should be excluded or included is a vexed question and has been for a "time whereof the memory of man runneth not to the contrary" and has harassed and perplexed courts and learned doctors of both the common and civil law from the earliest times down to the present day. It has been very appropriately termed by a distinguished writer of the Roman law the *controversia controversissima*. It is also insisted in behalf of this contention of respondents that the day *a quo* should be excluded under the provisions of our Code of Civil Procedure, which provides in section 6 that "the time in which any act 77
provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then that is also excluded." But we apprehend this rule as laid down in the Code of Civil Procedure only establishes the rule as to matters of practice in this Territory, and does not intend to fix the rule concerning matters of a general nature to which it has no relation, and therefore has no bearing on the question under consideration. It seems, so far as we have been able to discover from quite an extensive rummage and examination of the authorities on the subject, that the courts of both this country and England have excluded and included

the *terminus a quo*, doing the one or the other as the context and subject-matter seemed to indicate and justify. In the case of Pugh *v.* Duke of Leeds, Cowp., 714, which seems the leading case in the English courts, and which has remained the proper exposition of this vexed question, and which involved the validity of a lease and the power reserved in a marriage settlement to one Edwards to make leases, with many restrictions and qualifications, *inter alia*, the following: "That they were not to be in reversion, remainder, or expectancy;" the question was whether the lease was in possession, and turned upon the question of excluding or including the day of the date of the deed. The opinion in that case was delivered by that eminent jurist, Lord Mansfield—of whom it can be truthfully said he always walked, as it were, upon the mountain ranges of the law—in which he used the following language: "I will first consider it as supposing this a new question, and that there never had existed any litigation concerning it. In that light the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law, no technical form. All that is required is only enough to show that it is a lease in possession and not in reversion, and therefore if the words used are sufficient for that purpose the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it be construed exclusive or inclusive of the *terminus a quo*. While the gentlemen at the bar were arguing this case a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date, inclusive,' the term would have commenced immediately. If they had said 'from the day of the date, exclusive,' it would have commenced [illegible] day. But let us see

whether the context and subject-matter in this case do not show that the construction here should be inclusive as demonstratively as if the word 'inclusive' had been added. This is a lease made under a power. The lease refers to the power, and the power requires that the lease should be a lease in possession. The validity of it depends upon its being in possession, and it is made as a provision for an only daughter. He must therefore have intended to make a good lease. The expression, then, compared with the circumstances, is as strong in this respect of what his intention was as if he had said, 'I mean it as a lease in possession,' or 'I mean it shall be so construed.' If it is so construed, the word 'from' 82
must be inclusive. This construction is to support the deeds of the parties and give effect to their intention, and to protect property. The other is a subtlety to overturn property and defeat the intention of the parties without answering one good end or purpose whatever. To conclude the grounds of this opinion and judgment which I now deliver is that 'from' may in vulgar use and even in the strictest propriety of language mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense, which made their deed effectual." We have quoted from the case *supra* at
considerable length for the reason that we deem it a 83
lucid and able exposition of this vexatious question, albeit his lordship may seem at first blush to have labored under great stress of judicial weather; but, in our opinion, he succeeded in severing the Gordian knot with which this question has so long been entangled, but in doing so he had to strip it of its subtleties which seem to hang around about it and dissipate the clouds that darkened it by reason of conflicting decisions of the courts, the which he did by letting in the sunlight of reason and common sense. This case has since been followed in the case of Glassington *v.* Rawlins 3 East, 407, and other English cases, and this doctrine is also upheld in the 84
courts of this country both Federal and State. *Vide* Arnold *v.* U. S., 9 Cranch, 119; Griffith *v.* Bogart, 18

How. 158; Shocks *v.* Selden's Lessee, 2 Wall., 117; Dutcher *v.* Wright, 94 U. S., 553; Price *v.* Whitman, 8 Cal., 412; Lysle *v.* Williams, 15 Serg. & R., 135; Wright *v.* Forrestal, 65 Wis., 340; 27 N. W. Rep., 52. We do not claim that there is a uniformity of decisions of the courts of this country in regard to this question, but we admit that there is somewhat of conflict; but from a thorough examination of them we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which
85 will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties the *dies a quo* will be included, otherwise they will be excluded. We think that the word "from," in its literal and restricted sense, means "exclusive," but it may be used in a connection that means inclusive, and it is quite frequently used in the latter sense; and therefore in construing it courts will take into consideration the context and subject-matter and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection. Applying the doctrine of the case of
86 Pugh *v.* Duke of Leeds, and other cases cited *supra*, to the case at bar, it seems to us that we are compelled to include the day of the date of the patent to said West, and as a matter of course decide that the 15th day of June, 1885, the day on which he conveyed the land to appellant Young, was not within the period of limitation of the statute, and therefore the deed to said Young of that date was valid. We might properly arrive at this conclusion by treating the Indian as a minor and applying the law of this Territory in regard to minors and hold that the disability ceased the day before the fifth anniversary of the date of the patent; but we think that the following
87 conclusion is clearer and irresistible. It was clearly the intention of the statute under which said West obtained the patent to the lands that he should be deprived of the power to alienate it for the period of five years from the date thereof; hence, if we ex-

clude the day of its date in the computation of the time during which he was to be deprived of this power, we place it within his power to defeat the object of the law. Suppose the patent had been issued and delivered to him at 10 o'clock a. m. of the day of its date, what was there to prevent him from alienating the land between that hour and the hour of midnight of that day or at any time previous to the beginning of the next day if the *terminus a quo* be excluded? In which event we would have an anomalous, incongruous, not to say absurd, statute, containing within itself seeds the germination of which might defeat its object at the very threshold of its existence, for it is absolutely certain that West could have legally conveyed the land at any time after the issuance of the patent during the day of its date, unless said day be included in the computation of the five years during which the disability or limitation was in existence. It seems to us that this proposition is so clear and axiomatic that it is unnecessary to elaborate or discuss it at length. We therefore conclude that the day of the date of said patent should be included, and that the deed to Young for the entire 160 acres of land is a good and valid conveyance, and the judgment of the district court is reversed, and judgment ordered to be entered below in accordance with this opinion and as prayed for in the separate answer and counter-claim of appellant Timothy Young, all the justices concurring.

II

AS TO THE PATENT BEING ABSOLUTE ON ITS FACE:

The parties to the patent, on the one hand, are the Government, the grantor, and West, the patentee, who, under paragraph 4 of article VI, of the treaty of April 29, 1868, (15 U. S. Statutes at large p 635) upon receipt of the patent became, and was a citizen of the United States, and entitled to all the privileges and immunities as such citizen. With such "rights" and "immunities," certainly would be included the right of ownership in property, and the power of alienation of such property.

Here then, is a patent, regular on its face, issued and delivered by that department of the Government having jurisdiction in such matters, *to a citizen of that Government*, and it would seem to respondents, that a party purchasing the land included in the patent to West, would not be called upon by any rule of good faith or law of notice, to go further than the terms of the patent itself. He was dealing with a citizen, like himself, of the same Government; the patent in all respects regular, disclosed to him that its terms were absolute; that it granted to West and his heirs and assigns to the said land, with a *habendum* "to have and to hold the said land forever." What was the purchaser to understand by "*assigns?*" it would certainly repel any inference of limitation as to the power of the patentee in the disposal of the property included in the grant. The patent further disclosed upon its face that the grant was made under the general homestead laws of May 20, 1862, which provided for said patent, issuing to heads of families over twenty one years of age and citizens of the United States.

The patentee in this case fulfilled all the requirements of the statute; the department of the Government, clothed with that exclusive jurisdiction had passed upon the qualifications of the patentee and his "claim" to the land therein described had been "established," and "consummated," as recited in the patent and it had been delivered and passed from the possession of the grantor. To what further inquiry should the purchaser be put, under any rule of good faith or the law of notice by the recording acts of the then Territory? Bad faith cannot be imputed to the respondents upon a fair construction of the evidence, as it appears they actually paid to West some $250.00 in cash for the property, while the appellants offered no proof on the trial that they had actually paid any thing for the land. And the respondents in addition to the amount paid on the purchase price, have added to the property by way of improvements some $250.00. The whole transaction is manifestly one of good faith on the part of

respondents, and any thing other than this should be entirely removed in this part of the consideration of the point in question. 94

As to the effect of a patent, and its conclusiveness on all parties, this Court at a very early day, (1839) in the case of *Bagnell vs. Brodwick*, 13 Peters at 450, decided that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands declares, the patent the superior and *conclusive* evidence of legal title; until its issuance, the fee is in the Government, which, by the patent, passes to the grantee."

The same Court, in the case of *Gibson vs. Choteau*, 95
13 Wall. at 102, adopted the reasoning of the last case, and quoted the language above used; and adds: "The patent is the instrument, which under the laws of Congress passes the title of the United States. It is the government conveyance." * * * "and the patent, when regular on its face, is conclusive evidence of that title."

It would seem to respondents that the case of *Wilson* v. *Hall*, *6 Wall. 83* should be conclusive of the case at bar. This came up from the Supreme Court of Alabama on the construction of the treaty of 1830 of the United States with the Choctaw Indians. The United States patent had been issued to one Hall, an 96
Indian, under the provisions of the treaty. The words of grant in the patent were "to him, and *to his heirs*,' with a '*habendum*' 'to his or their heirs and assigns forever." Hall sold the land embraced in the patent to one Wilson, who took possession of it and made improvements on the land. Hall subsequently died, and his children brought suit against Wilson to recover that part of the land in which they claimed an interest by virtue of the terms of the treaty. The Alabama Court held in favor of the children of Hall, and that their father held the land sought to be recovered by them, under a true construction of the treaty, *in trust* for them; and that Williamson 97
was affected with notice of that trust (in the treaty) *although the same was not set forth on the face of the*

patent to Hall. That court further held that, "the construction given to the article of the treaty by the executive department of the government, *and the form in which the patent was issued*, could not change the meaning of the words of the treaty, nor control any court in interpreting them." It further appeared that Wilson, the purchaser from Hall, knew that he was a Choctaw Indian, and that his right to the land arose under the treaty. The treaty had been construed by the Department, and patents had been
98 issued accordingly.

Upon this state of facts, the Court say, "while it is fully conceded that this construction given to the treaty should prove a rule *for the subsequent conduct of the department, it can not affect titles before given by the government, nor does it pretend to do so*" * * * "The legislature may prescribe to the executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act." &c.

"The treaty did not operate as a grant, and a patent was necessary to the person who alone could perform the conditions.

"We do not consider it necessary to vindicate
99 the conclusion to which we have arrived in this case, by further argument on the grammatical construction of this section of the treaty. *Assume that the construction put on the treaty by the court below may possibly be correct. What then are the facts of the case?* The complainants below have applied to a court of chancery, which should be a court of conscience, to vacate the title of a *bona fide* purchaser, *who purchased and paid his money, and expended a life's labor on land granted by patent from the United States, conveying a fee simple estate, which was issued by the officers of the government without intention of imposing any trust on the grantee, or limiting it on the face of the deed.*

"It is contended that the purchaser is affected
100 with notice of the terms of the treaty referred to in his patent."

"If there be any trust for children it must be a constructive trust, *which is negatived by the express terms of the grant.* How can a chancellor build up

by the words *for* and *to*—words of equivocal import and doubtful construction—an equitable title in the children? The fact is clear that *such was not the construction under which the grantor gave the deed or the grantee accepted it.* A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge." 101

Speaking of the force of a patent from the Government, the same court, in the case of *Beard v. Federy, 3 Wall. at 492*, say: "As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming, under the government by title subsequent. It is this effect of the patent as a record of the government that its security and protection chiefly lie."

In the case of *Smelting Co. v. Kemp, 104 U. S., at 640 and 647*, the court say: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law." * * * "If in issuing a patent its officers *took mistaken views of the law*, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved." * * * "It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account authorize proceedings to vacate the patent or limit its operations." 102 103

In the case of *Steele v. Smelting Co., 106 United States at 450, 451 and 452*, the court further say, as to the power and jurisdiction of the land department
104 of the government in the alienation of the public lands:

"The department, as we have repeatedly said, was established to supervise the proceedings whereby a conveyance of the title, from the United States to parties, of the public domain is obtained, and *to see that the requirements of the different acts of Congress are complied with.* Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon those matters is that of a special tribunal, and is
105 unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And the court further says in the same case, as to impeaching the validity of a patent: "That it would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States, a cheap and unstable reliance as a title for lands which it purported to convey."

And further sustaining this view, we would cite
106 *Maxwell Land Grant Case, 121 U. S., at 380.*
Moore v. Wilkinson, 13 Cal. at 487–8.
Jonson v. Towsley, 13 Wall. 72 at 83.
Moore v. Robbins, 96 U. S. 530.

The case of *Smelting Co. v. Kemp, 104 U. S., 636, supra*, sustains the doctrine contended for by respondents and is directly in point as to the objection offered to the introduction of the record of the General Land Office upon which the patent was issued; and as to the further objection to the introduction of the evidence that the patentee, West, was an Indian.

The case was brought by the Smelting Co. for the possession of certain real property, claiming 107
title through the U. S. patent to one Starr by sundry conveyances, to the company.

Upon the introduction of the patent and the deeds, tracing title back to the patentee, the plaintiff rested. The defendant offered in evidence a certified copy of the record of proceedings in the General Land Office at Washington, upon which Starr obtained his patent. The plaintiff objected to the introduction of the evidence. But the court overruled the objection, and admitted the evidence, to which exception was taken.

Mr. Justice Bradley, in delivering the opinion of 108
the Court, considers, among others, first the objection: "Error in admitting the record of the proceedings of the General Land Office to impeach the validity of the patent to Starr issued upon them," and at page 640 says:

"We are of opinion that these several grounds are well taken, and that in each particular mentioned the court belowed erred.

"The patent of the United States is the convey ance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating 109
the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that, their judgment as to matters of fact, properly de- 110
terminable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals,

upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment." And at page 647 same case, he further says:

"According to the doctrine thus expressed and the cases cited in its support,—and there are none in conflict with it,—there can be no doubt that the
111 court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation."

The above doctrine is sustained by some of the earliest decisions of this court, and is affirmed in *Steele v. Smelting Co., 106 U. S. supra*, under substantially the same state of facts, and also in the case of *Lee v. Johnson*, 116 U. S. 48.

This question was before the court of New York at a very early day, in the case of *Goodell v. Jackson*, 20 Johns, 695. The legislature of that state had
112 passed several resolutions providing for the issuance of letters patent to certain persons who had been officers or soldiers in the war of Independence. The legislature provided further that the commissioners of the land office were to *decide* who were entitled to lands under the resolutions, after an examination of the claims of such officers and soldiers. A patent was issued according to the terms of the resolutions, and under the authority of the act of the legislature, by the commissioners of the land office, to one Sagoharase, an Indian lieutenant.

It was further provided that certain amounts should be given to each in proportion to their rank
113 and that 1,000 acres should be the amount allowed to lieutenants. But Sagoharase did not come within the description of the persons to whom patents should issue, as provided by the legislature. Upon this state of facts, the Chancellor, at page 705, says:

"I have not been able then, to discover the legislative authority for this patent. But the commissioners of the land office did decide, that *Sagoharase* was entitled to a portion of the bounty lands as a lieutenant, and we ought now to acquiesce in the authority of that decision. They gave him a patent

not for 1,000 acres, but for 1,200 acres; and it is now too late, and certainly this is not the occasion, to call 114
in question the validity of the patent." * * * * "The decision of the commissioners of the land office must now be taken to have been correctly made."

Upon this question in the Court below, the appellants relied upon the following cases: Kansas Indian Cases 5, Wall. 737; Smith v. Stevens, 10 Wall, 321; Same case 2 Kan. 238; Clark v. Libby 14, Kan. 435, and Farrington v. Wilson 29, Wis. 383. We submit that the rule laid down by the above cases has no application to the one at bar. From an examination of each of these cases it will be observed, that not only the law of Congress, or the treaty en- 115
tered into by the several tribes of Indians, involved in these adjudications, prohibited a transfer or alienation, but also provided that such prohibition should be embodied in the patent issued by the Government. And it appears in each case, that such provision of the law or treaty was recited in the face of the patent. Parties in these cases purchasing from the grantee, had full record notice of the inhibition of the law or treaty in the instrument by which the Government conveyed its title to the repective parties. But no such notice was given in the case in question.

In determining defendant's rights in the premises 116
it is proper for the court to take into consideration the important and well settled rule, as to the rights of persons who duly make their application and first filing under the homestead laws of the United States, to land subject to such entry, and have otherwise complied with the law.

West had made his application and first entry or filing, in due form, June 18, 1873, under the rules and regulations prescribed by the General Land Office. The presumption is that he duly made said application and entry, and the department in awarding him the patent afterwards, is presumed to have 117
held that such entry was duly made under the laws in force in 1873. The department at that time, under such homestead laws, did allow filings by Indians

(See circular of General Land Office, issued August 3, 1872 and printed in the year 1873, page 28, Sec. 27.)

West, by making such application, filing, and entry in 1873, and complying with the law and rules of the department had a vested right in said land, and he was entitled to it as a matter of right; and
118 this might have been and probably was the view of the department as to West's rights in the premises when the absolute patent was issued to him in 1880.

It seems to us it would be an outrage on defendants, committed under the forms of law, and under the guise of equity, to compel them as mere laymen, after having taken the government at its word, to suffer a new limitation to be ingrafted into the patent not previously contained therein, which would destroy their title to the property for which they paid West about $1,500 in cash, and put improvements thereon to the extent of about $3,000, and drive
119 Young from his honestly acquired home, which he has built up with industry and honest labor.

III.

Conceding that the conditions of the Statute might have been embodied into, and limited, the terms of the absolute grant under the patent, to West, as heretofore stated, yet, the patent having been issued by the government, absolute in form, and without limitation on the power of alienation, it is not competent for the plaintiffs in a case like the one at the bar, to affix any limitation to the patent, or modify the same, contrary to or in addition to the
120 terms contained therein.

This matter has been passed upon by the land department of the government, as to West's qualification to obtain such patent, and as to his being an Indian or a white citizen, and whether he has performed the other acts required, entitling him to secure such patent. And the court, in the *Smelting Co.* cases *supra*, says that the judgment of the land department upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings, and that "this can be accomplished only

by regular judicial proceedings, taken in the name of the government for this special purpose." This is the uniform doctrine held by numerous decisions of this Court, including the cases cited, to sustain the preceding point, and they need not be again 121
quoted.

In the case of *Lee v. Johnson*, 116 U. S. page 48, the foregoing doctrine held in the *Smelting Co.* cases is expressly affirmed and repeated. And we do not think that plaintiffs counsel can find a decision to sustain the position of appellants. They are not claiming adverse possession to West, but claiming under him, and are seeking to assail the patent under which he claims, and against which West never complained, and which the government has never taken any action to modify

This question has been very frequently consider- 122
ed by this Court, and in the case of the United States v. Marshall Mining Company 129, U. S., at pages 587-8-9, the Court say: "All the errors and irregularities which occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the Land Department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. * * * *

"If the officers of that department of the government have acted within the general scope of their power, and without fraud, the patent which has is- 123
sued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law which confers their authority, as to demand a cancellation of the instrument. * * * *

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured." *
*

125

IV.

The deeds from West to Thayer, dated June 17, 1885, and from Thayer to plaintiffs, are void, under section 681 of the Civil Code of South Dakota, because: "At the time of the delivery thereof the real property was in the actual possession of persons claiming title adverse to the grantors." (*See same Provision, Sec. 147, Chap. 1, on Real Property, Page 2196 N. Y., Rev. Statutes, and numerous cases cited.*) This adverse possession was admitted upon the trial by plaintiffs' counsel, and it was so expressly found by the court. (*See findings 3 and 5, pages 26–27—Record*).

126 And the court also find that said West and Thayer were out of possession at that time (*findings 6, 7 and 8, page 28—Record*). But the plaintiffs endeavor to avoid the effect of such admitted, proved and found facts, by finding "that such possession of Brown and Young were entirely founded on conveyances that are absolutely null and void." (*Finding 13, page 29—Record*).

This is claimed to be a finding of facts, but is mostly a conclusion of law. It seems to us that on the admitted and uncontradicted evidence and the facts found, it is conclusive, that the above deeds under which plaintiffs claim are void as against defendants, even when the court omitted to find that

127 the adverse possession was in good faith for the alleged ground that the possession was founded on void instruments, or upon any other ground. Sections 46 and 48, Code Civil Procedure South Dakota.

Hasbrouk v. Bowe, 62 N. Y. 482.
Hamilton v. Wright, 37 N. Y. 502 at 506.
Forman v. Peterson, 111 *Mass.*, 148 *at* 151.
Edgerton v. Bird, 6 *Wis.* 512.
McMahan v. Bowe, 114 *Mass.* 140 *at* 144.
2 Blackstone (Cooley's) P. 290 and note.
Livingston v. Proseus, 2 *Hill.* 526.
Williams v. Jackson 5 John. 489.

128 *Livingston v. Peru Iron Co., 9 Wend. at* 516.

This last case was relied upon by plaintiffs' counsel in the court below to avoid the effect of the adverse possession on the one part of Young and of the

eighty by Brown; but we submit that it has no application to the case at bar.

The findings by the court of the adverse possession in the defendants is *clear*, full and *decisive*, and are in themselves amply sufficient to render void as against defendants, the deeds under which the plaintiffs claim title. The court having found the facts showing adverse possession, in order to destroy the 129
effect of these findings, must have found under the law as stated in that case, that the possession was in "bad faith" or obtained by fraud. And this is as far as the Peru Iron Works case goes. It holds, if the deed was obtained by fraud or forgery, it will not serve as a foundation of an adverse possession.

We assert that no fraud or bad faith is alleged or even introduced in evidence, and the evidence, admitted facts and findings of fact on this point are all with defendants. Besides, the findings need not state more facts than forms a good pleading of the same fact. It is settled that "good faith" need not be 130
alleged in setting up defense of adverse possession; and this is uniform rule as well as the settled forms of pleading.

See 2 *Estie's Pleadings*, (3 *Ed.*) *Sec.* 3,80.
2 *Abbott's Forms*, (1 *Ed.*) *Page* 155.

And even in complaints in alleging possession the element of good faith is not alleged.

2 *Estee's Pleadings*, (3 *Ed.*) *Sec.* 2242 *and* 2261 *and cases cited.*

See also Sec. 650, *Code Civil Procedure South Dakota.*

Besides the Statute, both in the Civil Code and 131
Code of Procedure, *cited supra*, does not include the words "good faith;" and when the court finds the adverse possession as full as a good pleading and as full as the language of the Statute, it certainly is sufficient and entitled the defendants to a judgment declaring the deeds void under which plaintiffs claim, and a reversal of the judgment and dismissal of plaintiffs' cause of action. Besides the law presumes that all men act in *good faith* until the contrary is shown, and in the absence of evidence, good faith

and color of title under a deed is presumed, and the
132 court will hold the title was acquired in good faith unless the contrary appears.

Brooks v. Bruyn, 35 Ill. 392.

McCagg v. Heacock, 42 Ill. at 157.

Morrison v. Morman, 47 Ill. 1477.

And the plaintiffs cannot avoid the effect of the finding of the court and the admissions and undisputed evidence by calling the deeds a nullity, erroneously, following also the doctrine stated generally in Peru Iron Works case and attempting to apply it to the case at bar.

This position and finding is a misconception of the law, and the law as applied to this case. All the
133 deeds under which defendants claim and as found by the court, are perfect in form and substance, were actually signed, acknowledged and delivered, and recorded, and the consideration therefor actually paid in cash, long prior to the deeds under which plaintiffs claim title. No suspicion is thrown around the procuring of the same, and no fraud or bad faith alleged or attempted to be proved. The deed under which Young claims the 40 acres is a warranty deed with full covenants, and the second deed is a quit claim in due form; and the two deeds under which Brown claims title are both full covenant warranty deeds. They certainly are not null and void on their
134 face, but legal and valid; but, if void it is something outside of the deeds themselves. They are absolutely good under the evidence and findings of fact of the court. We concede to the doctrine that a conveyance void on its face is not sufficient to make out a color of title.

Sanol v. Hepburn, 1 Cal. 255.

Moore v. Brown, 11 How. 424.

Jackson v. Woodruff, 8 Cow. 276.

The same rule applies to a claim under a deed obtained by the party, by fraud or forgery, or if no land is described in the deed.

135 "Color of title" contrary to the finding in this case "is that which in appearance is title, but which in reality is not title" and a claim to property under a conveyance, however incompetent the grantor may

have been to convey, is a claim under color of title, and supports adverse possession. 136

2 *Waits Action and Defenses*, 17.
Edgerton v. Reed, 6 *Wis.* 527.
Brooks v. Bryn. 35 *Ill.* 392.
1 *Bouvier* 335.
3 *Washburn on Real Property*, 138, 3d *Edition*.

V.

We urged as an additional ground for reversal in the court below, which briefly stated is as follows: The court finds that Young put permanent improvements on the 40 acres first purchased by him from West amounting in value to $2,000 aside from the value of the land. As the deeds are absolutely good on their face, and the whole evidence tends to show the improvements were put on by Young, in good faith and under color of title, and as such evidence is 137
entirely uncontradicted; the defendant Young was clearly entitled to the finding requested by him which would entitle him to the value of such improvement as provided in section 643 of the Code of Civil Procedure, of South Dakota, as follows: Issues may be joined and tried as in other actions, and the value of the land aside from the value of the improvements thereon, and the separate value of the improvements must be specifically found by the verdict of the jury, the report of the referee, or the findings of the court. Conceding that the court could reduce the amount of such value to $2,000, there can be 138
no doubt of Young's right to his improvements, and he would have been entitled to a new trial, or a finding by this court to that effect and directing judgment for the $2,000, according to the statute.

Finney v. Northern Pacific R. R. Co., 3 *Dak.* 270.

The Supreme court of Dakota lays down the rule in regard to motions for a new trial, and holds in the case of the *Moline Plow Co. v. Gilbert* 3 Dak., 240, that where there is a substantial conflict of evidence and the evidence is sufficient to sustain the finding, it will not be disturbed by the court. But here there

139 is no conflict of evidence, it is all one way and uncontradicted in favor of Young and entitled him to a finding for his improvements.

We respectfully submit that the judgment of the Supreme court of the Territory should be sustained.

ROBERT J. GAMBLE.
Attorney for Respondents.

140

un-
o a

14725640

Office Supreme Court U. S.
FILED.
JAN 9 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

Case No. 13666. *Term No.*, 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG, RESPONDENTS.

DEFENDANTS' SUPPLEMENTAL BRIEF.

ROBERT J. GAMBLE,
Attorney for Defendants.

JUDD & DETWEILER, PRS., WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1892.

Case No. 13666. *Term No.*, 112.

S. S. TAYLOR AND S. A. BIDWELL, APPELLANTS,

vs.

ALFRED BROWN AND TIMOTHY YOUNG, RESPONDENTS.

DEFENDANTS' SUPPLEMENTAL BRIEF.

The attorney for the defendants in error begs leave to submit an additional and supplemental brief to the one already filed in their behalf, on January 4, 1893. At the time of the preparation of the original brief he did not have before him the brief of plaintiffs in error in this case and was not aware of its contents, only as anticipated from the brief used on the argument, when the cause was heard before the supreme court of the Territory of Dakota. Since our arrival here, a few days since, we have had an opportunity to examine the original record and consider the questions raised by it, and by plaintiffs in their brief filed in the cause. The condition of the record is such we feel justified in calling the Court's attention to it, and submit there is nothing

before this Court for review under its rules of practice and decisions.

It will be observed from the RECORD in the case and the STATEMENT of defendants in the original brief that this action was tried before the district court without a jury, and findings of fact and conclusions of law were separately made and filed by said court in favor of the plaintiffs and against each of the defendants. Findings of fact and conclusions of law were separately asked by each of the defendants, and the same were refused, and exceptions duly taken to such findings and to the refusals of the court to find as asked by each defendant. A bill of exceptions was duly settled by the court, and separate motions for new trials made by each defendant upon the grounds therein stated, and overruled by the court; to which due exceptions were taken. Judgment was entered in favor of the plaintiffs and against each defendant. Separate appeals were taken by each defendant to the supreme court of the Territory from the judgment and order overruling the motion for a new trial upon due assignments of error, bringing up the whole record and findings for review in that court. The cause was heard and the judgment of the supreme court entered on the 24th day of May, 1888, was, "that the judgment of the said district court within and for "said Moody county appealed from herein be, and the same "is hereby, reversed, and said action is remanded to said "district court with instructions to dismiss the complaint of "the plaintiffs and to enter judgment in accordance with "the opinion of this court. And it is further ordered that this "cause be, and it is hereby, remanded to the district court "for further proceedings according to law and the judgment

" of this court." (Record, page 147.) It will further be observed that on the 1st day of October, 1888, upon the application of the plaintiffs the supreme court of the Territory allowed an appeal to this Court from the judgment so entered, and an undertaking on appeal was allowed by that court on the 8th day of February, 1889, as of the date of the allowance of the appeal. (Record, pages 149–151.) The citation was issued on the 13th day of February, 1889, and served on the 7th and 21st days of March, 1889, on the defendants and attorneys respectively. (Record, page 153.) A transcript of the record was made, and filed in this Court September 30, 1889.

Upon this record a review of the judgment is sought in this Court. Under the rules of practice and the holdings of this Court we claim the plaintiffs have nothing before this honorable Court for its examination. No findings were made by the supreme court of the Territory or requested by the plaintiffs in this case. This question has at different times been before this Court, and it would seem to defendants there can be no question as to the insufficiency of the record, and this Court would be precluded from a consideration of the questions passed upon by the court in which this judgment was entered. The practice act of the Territory of Utah upon the subject of appeals is substantially the same as that of the Territory of Dakota. I quote from the syllabus, in which a full statement is given in the case of Stringfellow *vs.* Cain, 99 U. S., 610. Where the record of a suit is duly certified upon an appeal to a district court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its orders refusing a new trial and from its judgment

are taken to the supreme court of that Territory, the statute whereof requires a statement, to be settled by the judge who heard the causes, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them, and no more;" and where a statement, settled and signed by him and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the district court upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to said Supreme Court, held: 1. That the proceeding was thus made to conform to the requirements of the practice act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. 2. That if that court reverses the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing here; but if it has all the evidence which could be considered below, should the case be remanded, it may state the facts established by the evidence and render judgment. On an appeal to this Court the case, if otherwise properly here, will be determined upon the facts so stated. The Chief Justice, in rendering the opinion of the Court, clearly states at page 614 that where there is a reversal in the supreme court of the judgment of the district court because the evidence does not sustain the findings, like the case at bar, other findings must be made before the case can be put in a condition for hearing in the Supreme Court of the United States on appeal. It

would seem that the holding of this case would effectively dispose of the one at bar, and that there is nothing presented in the record for a review of the judgment.

The same question was raised in the case of O'Reilly *vs.* Campbell, 116 U. S., 418, and the case of *Stringfellow* vs. *Cain*, *supra*, was followed, holding that where the judgment of the lower court is sustained by the supreme court of the Territory the findings of the lower court are adopted by it, and on an appeal to the Supreme Court of the United States they are open to review and examination here; but this would not be true if the judgment of the lower court had been reversed by the supreme court of the Territory and no new findings had been made by that court. The case of Gray *vs.* Howe *et al.*, 108 U. S., 12, arose upon the same state of facts as that of *Stringfellow vs. Cain, supra.* The condition of the record was the same as this case. The judgment in the lower court was in favor of the plaintiffs. Upon an appeal to the supreme court of the Territory the judgment was reversed and no findings were made by that court. The cause was appealed to this Court. The opinion is by Chief Justice Waite, and is in part as follows: "After the findings and conclusions were filed in the district court, the present appellees excepted on the ground that the facts as found were contrary to the evidence, and also because the court refused to find facts as requested by them. A motion was also made to set aside the findings and grant a new trial. This motion was overruled and judgment entered in favor of the claim of Gray. Thereupon the present appellees appealed to the supreme court both from the refusal to grant a new trial and from the judgment. The supreme court reversed the judgment of the district court and remanded the cause,

with instructions to enter a judgment rejecting the claim of Gray and allowing the claims of the appellees. From this judgment of the supreme court Gray took the present appeal. The supreme court made no 'statement of the facts of the case in the nature of a special verdict.' As that court must have set aside the findings of the district court in order to render the judgment it gave, there is nothing here which we can re-examine. * * * A judgment has been rendered by the supreme court in every way inconsistent with the findings of the district court. The necessary inference, therefore, is that the findings sent up to that court were set aside and the case disposed of on the evidence." The case of *Stringfellow* vs. *Cain, supra,* is referred to and approved, and the judgment of the supreme court was affirmed by this Court.

It might be suggested that a motion to dismiss the appeal would be the proper method to raise the question before this Court. It would appear, however, from the cases cited, the matter came up and was disposed of by the court at the regular hearing of the cause. Under paragraph 4 of Rule 21 the court, upon its own motion, can take notice of the condition of the record as presented, and if the statute and rules are not complied with the proceedings may be disregarded by this Court. This Court, in the following cases, on its own motion, where there was no assignment of errors attached to the record, or specification of errors in the brief, affirmed the judgment of the lower court.

Bentes *vs.* Hampton, 123 U. S., 519.

Stevenson *vs.* Barbour, 140 U. S., 48.

Boston Mining Co. *vs.* Eagle Mining Co., 115 U. S., 221.

Treat *vs.* Jamison, 20 Wall., 652.

No assignment of errors is attached to the record, and the specification of errors embodied in the brief of plaintiffs, under any view of the condition of the record, must be held wholly insufficient. It is impossible from the record to make the assignment intelligible, and counsel is obliged to go outside and refers to the brief of defendants used in the appellate court of the Territory. (Plaintiffs' brief, pages 2 and 3.) He cannot make up the issue he has stated from the record in fact. He has no exception in the record upon which to base a specification. The judgment from which the appeal is taken recites no ground upon which it is based. Any mere statement of counsel will hardly be sufficient to invade or explain it. Without reviewing the judgment in the manner and form pointed out by the rules of procedure, it is hardly competent to seek to explain it, or the grounds upon which it is based, from any reasons given by the court outside of the judgment itself, whether stated in the opinion of the court or otherwise.

The counsel for plaintiffs in error in his brief (page 3) seeks to limit the argument to one question. Even if that is presented for the consideration of this Court, it surely cannot be contended that the defendants would be precluded from urging any reason properly before the Court, whether discussed by plaintiffs' brief or not, why the judgment appealed from should not be sustained. This view governed us in presenting our argument in our main brief, presuming the questions there discussed were properly before the court on this appeal. All reasons properly before the lower court are open to support the judgment appealed from, and it may be sustained on other grounds, if it rests upon a sound

principle, than the one upon which it was placed in the court below.

Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree, when the case is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or irregular. *They may be heard in support of the decree*, and in opposition to every assignment of error filed by the appellants.

"The Stephen Morgan," 94 U. S., 599.

As the judgment in this case rests upon a sound principle of law, this Court affirms it, although it was put by the court below upon an unsound principle.

Sullivan *vs.* Iron Silver Mining Co., 143 U. S., 431.

We insert here in compliance with the rules what was inadvertently omitted at folio 117, page 36, of our main brief.

The homestead and pre-emption privilege is conceded to Indians who have voluntarily dissolved all connection with their tribes and no longer share in annuities, or in exemptions, or in privileges secured to them by acts of Congress or treaty stipulations. Special forms of affidavit with corroborative testimony are required in these cases, forms of which are attached, Nos. 10 and 11.

Circular from Gen'l Land Office, issued August 30, 1872, sec. 27, p. 8.

We also insert the section of the statute of March 3, 1875, referred to in our brief in which the inhibition as to alienation by an Indian is embodied, the same not having been set out in the brief of plaintiffs.

"SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years, and who has abandoned, or may hereafter abandon his tribal relations shall, on ma' ing satisfactory proof of such abandonment under the rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: *Provided*, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property the same as though he had maintained his tribal relations, and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void."

Chapter 131. An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30, 1875, and prior years, and for other purposes.

18 U. S. Statutes at Large, 420.

At page 22 of our main brief we make a general statement as to the rule invoked by defendants for the proper computation of time in a case of the character here presented. We invite the Court's careful attention to the

cases cited by plaintiffs in error at page 9 of their brief. We think it will demonstrate the rule contended for by defendants. From an examination of the cases cited by plaintiffs it will be found they are nearly all upon matters of civil procedure and from code States wherein there is either a general law or one especially applicable to questions of procedure. From the States cited Nebraska, Minnesota, New York, Kansas, Iowa, and California have a statute like our own embodied in their codes of procedure (defendants' brief, folio 42, p. 13). Wisconsin also had the same provision in its Code of procedure until a very recent period and still retains it as to excluding the first day in regard to the publication of notices. Illinois and New Hampshire have the statute with general application. Virginia has a statute of similar import as to the service of notices. I am unable to find any enactment upon the subject in either the States of Michigan or Massachusetts. The cases cited, aside from the class above indicated, are those giving the right of redemption and the like, in which we quite agree that the first day should be exclusive. The day should be counted exclusive or inclusive so as to avoid a forfeiture; and "courts will always prefer that construction which will confirm rather than destroy any *bona fide* transaction or title."

We reassert, notwithstanding the criticisms in plaintiffs' brief, the uniform holding of this Court in harmony with the rule of construction contended for by defendants in matters affecting property rights or of the citizen, aside from mere matters of practice or procedure. The question only incidentally arose in the case of Ball *vs.* Polk, 18 Wall., 119, on an objection to the certificate of the Register of the

local land office attached to papers offered in evidence at the trial.

We do not share in the apprehension indulged in in the plaintiffs' brief at page 5, wherein serious consequences are apprehended from the supposititious case presented. Under the rule laid down by the statute of our own State and quoted in our main brief (folio 38, p. 11) it would not matter at what hour of the day the patent was issued on June 15, 1880. In computation and effect it would embrace the whole day. The party who first received the deed on June 15, 1885, and placed it on record would secure the title, and it would not matter as to what hour of that day it might have been.

Plaintiffs' counsel is very solicitous, as heretofore, that the court should protect the rights of the Indian. The Indian himself does not seem so far to have made any complaint, and in fact has had no reason for so doing, for he received full value for the premises conveyed. His anxiety for the Indian is only a subterfuge in behalf of the interests of his client. The Indian will receive no more for his lands, whatever may be the final disposition of this case. The testimony showed that the second deed from the Indian West to the plaintiffs' grantor was only for a consideration of $20, and no proof was submitted as to its payment. The testimony as to the entire transactions between West and the defendants showed absolute good faith on their part and that full value was paid. We submit that West should be treated fairly and as any other citizen of the Government, and the law should interpret this statute in connection with the transaction had between West and the defendant Young, and the deed

should be sustained. West had the protection of the statute for the full time that the law contemplated. Any other construction would render ineffectual the intention of the law. If the day the patent issued is not to be counted, West might on that day have disposed of the land and rendered nugatory the express limitation of the provision of the statute. The law contemplated the grant and the inhibition to take effect at the same moment of time.

I will not reply to the criticisms made in the brief of plaintiffs against the defendants, and as to their good faith. The record discloses no bad faith on their part. There were no allegations of bad faith in the pleadings against them. No such proof was offered or sought to be made, and no findings were asked for by the plaintiffs. This element, surely, is lacking in the record.

Respectfully submitted.

ROBERT J. GAMBLE,
Attorney for Defendants.

JANUARY 7, 1893.